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# **THE ETHICS OF COSMOPOLITAN GOVERNMENT IN EUROPE**

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***SUBJECTS OF INTEREST / SUBJECTS OF RIGHT***

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Thesis submitted in partial fulfilment of the requirements for the degree of Doctor  
in Philosophy in Politics and International Studies.

University of Warwick  
Department of Politics and International Studies  
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# Summary of Contents

<b>INTRODUCTION: THE ETHICS OF COSMOPOLITAN GOVERNMENT IN EUROPE .....</b>	<b>1</b>
<b>PART I: A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE: TOWARDS A MARKET COSMOPOLITAN ORDER? .....</b>	<b>57</b>
CHAPTER 1: A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE I: CONCEIVING A EUROPEAN ECONOMIC UNIT .....	60
CHAPTER 2: A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE II: REALISING A EUROPEAN ECONOMIC UNIT .....	110
<b>PART II: LEGAL COSMOPOLITAN GOVERNMENT I: THE ETHICS OF A <i>EUROPEAN</i> COSMOPOLITANISM ...</b>	<b>159</b>
CHAPTER 3: CONCEIVING LEGAL COSMOPOLITAN GOVERNMENT I: EUROPE AS 'SOCIAL EUROPE' .....	162
CHAPTER 4: SECURING LEGAL COSMOPOLITAN GOVERNMENT I: 'SOCIAL EUROPE' AND ITS OTHERS .....	205
<b>PART III: LEGAL COSMOPOLITAN GOVERNMENT II: THE ETHICS OF A <i>COSMOPOLITAN</i> EUROPE.....</b>	<b>254</b>
CHAPTER 5: CONCEIVING LEGAL COSMOPOLITAN GOVERNMENT II: PLURAL EUROPE AND DELIBERATIVE GOVERNANCE ...	257
CHAPTER 6: SECURING LEGAL COSMOPOLITAN GOVERNMENT II: 'SUBJECT OF RIGHT' MEETS 'SUBJECT OF INTEREST' .....	301
<b>CONCLUSION.....</b>	<b>355</b>
<b>BIBLIOGRAPHY .....</b>	<b>372</b>

# Contents

ACKNOWLEDGMENTS & DECLARATION .....	V
ABBREVIATIONS .....	VI
ABSTRACT .....	VII
<b>INTRODUCTION: THE ETHICS OF COSMOPOLITAN GOVERNMENT IN EUROPE .....</b>	<b>1</b>
<i>Introduction .....</i>	<i>1</i>
<i>From Cosmopolitanism to Cosmopolitan Government .....</i>	<i>8</i>
<i>Central Thesis: Two Faces of Cosmopolitan Government in/of Europe .....</i>	<i>17</i>
<i>Contributions to the Literature: Foucauldian Methodology on Ethics .....</i>	<i>24</i>
<i>Foreshadowing Conclusions: Foucauldian Methodology as Ethics .....</i>	<i>45</i>
<i>Chapter outline .....</i>	<i>49</i>
<b>PART I: A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE: TOWARDS A MARKET COSMOPOLITAN</b>	
<b>ORDER? .....</b>	<b>57</b>
CHAPTER 1: A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE I: CONCEIVING A EUROPEAN ECONOMIC UNIT .....	60
<i>Introduction .....</i>	<i>60</i>
<i>Liberal Governmentality and Cosmopolitan Rationalities .....</i>	<i>63</i>
<i>Liberal Government and Utilitarian Security: Market Cosmopolitan Rationalities .....</i>	<i>72</i>
<i>Liberal Government and Social Security: Legal Cosmopolitan Rationalities .....</i>	<i>92</i>
<i>Conclusion .....</i>	<i>106</i>
CHAPTER 2: A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE II: REALISING A EUROPEAN ECONOMIC UNIT .....	110
<i>Introduction .....</i>	<i>110</i>
<i>From Legal to Market Cosmopolitan Europe .....</i>	<i>113</i>
<i>An Ordoliberal Economic Constitution: Extending Market Subjectivities .....</i>	<i>126</i>
<i>An Inexorable Logic? : Market Subjects ‘all the way up and all the way down’ .....</i>	<i>139</i>
<i>Towards a Legal Cosmopolitan Resistance .....</i>	<i>147</i>
<i>Conclusion .....</i>	<i>155</i>
<b>PART II: LEGAL COSMOPOLITAN GOVERNMENT I: THE ETHICS OF A EUROPEAN COSMOPOLITANISM ...</b>	<b>159</b>

CHAPTER 3: CONCEIVING LEGAL COSMOPOLITAN GOVERNMENT I: EUROPE AS 'SOCIAL EUROPE' .....	162
<i>Introduction</i> .....	162
<i>A Legal Cosmopolitan critique of Market Cosmopolitan Europe</i> .....	167
<i>Resisting the Market Constitution in practice: French constitutional patriotism</i> .....	181
<i>Conclusion</i> .....	201
CHAPTER 4: SECURING LEGAL COSMOPOLITAN GOVERNMENT I: 'SOCIAL EUROPE' AND ITS OTHERS .....	205
<i>Introduction</i> .....	205
<i>Constructing a European Constitutional Patriotism</i> .....	208
<i>Securing the European Demos in/ through French Policy</i> .....	223
<i>Limits and Possibilities of a 'Statist-Legal' Cosmopolitan Government</i> .....	242
<i>Conclusion</i> .....	249
<b>PART III: LEGAL COSMOPOLITAN GOVERNMENT II: THE ETHICS OF A COSMOPOLITAN EUROPE</b> .....	<b>254</b>
CHAPTER 5: CONCEIVING LEGAL COSMOPOLITAN GOVERNMENT II: PLURAL EUROPE AND DELIBERATIVE GOVERNANCE ...	257
<i>Introduction</i> .....	257
<i>Legitimacy via/of Governance: A Brief Genealogy</i> .....	261
<i>Conceiving a 'Deliberative-Legal' Cosmopolitan Government</i> .....	273
<i>Realising a 'Deliberative-Legal' Cosmopolitan Government in the EU</i> .....	284
<i>Conclusion</i> .....	299
CHAPTER 6: SECURING LEGAL COSMOPOLITAN GOVERNMENT II: 'SUBJECT OF RIGHT' MEETS 'SUBJECT OF INTEREST' .....	301
<i>Introduction</i> .....	301
<i>The OMC and Market Cosmopolitan Government: Constituting the Entrepreneur</i> .....	304
<i>The Possibilities and Limits of Resistance</i> .....	320
<i>'Subjects of interest' and 'Subjects of right': Towards an Ethical Ambiguity?</i> .....	344
<i>Conclusion</i> .....	350
<b>CONCLUSION</b> .....	<b>355</b>
<i>The Ethics of Uncertain EU(ropean) Subjects</i> .....	355
<i>Towards an Ironic Cosmopolitan Politics in/for EU(rope)</i> .....	366
<b>BIBLIOGRAPHY</b> .....	<b>372</b>

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## *Declaration*

This thesis is my own work and has not been submitted for a degree at another University. Some of the arguments contained herein appear in previously published work and are referenced throughout (see Bibliography). However, they have been significantly updated and adapted in the context of this thesis.

## Abbreviations

ECHR – European Convention on Human Rights

ECJ – European Court of Justice

ECtHR – European Court of Human Rights

ECSC – European Coal and Steel Community

EEC – European Economic Community

EMS – European Monetary System

EMU – European Monetary Union

ERT – European Roundtable of Industrialists

EU – European Union

FSU – Forward Studies Unit

OMC – Open Method of Co-ordination

SEA – Single European Act

SGP – Stability and Growth Pact

WTO – World Trade Organisation

## Abstract

Adopting a Foucauldian critical methodology, this thesis reflects upon the inherent ambiguities of cosmopolitan government in/of EU(rope), which, it is suggested, are borne out in the ambiguous relationship between the particular liberal subjects – a ‘subject of interest’ and ‘subject of right’ – that such government seeks to identify, produce and foster. Developing Foucault’s own recently published genealogy of liberal government, it is argued that cosmopolitan government can be conceived as the promotion of (neo)liberal deregulatory market agendas within and beyond EU(rope): a EU(rope) *of* free competitive ‘subjects of interest’, increasingly conceived as *entrepreneurs*. This, it is argued, is the constitutive basis of contemporary post-national government in EU(rope) (Part I). Taking seriously the nuances in Foucault’s analysis, cosmopolitan government can, however, also be understood in terms of the evocation of EU(rope) *as* socially just nation-state rooted in constitution and social-contract: a EU(rope) *of* ‘subjects of right’ or *citizens*. Such a conceptualisation is often evident in scholarly and practical opposition to the perceived extremes of a ‘market’ Europe, as illustrated via an analysis of Habermas’s scholarship and French discourses on EU(rope) (Part II). Finally, taking the deliberative impulse in Habermas much further than he does in his own work on EU(rope), a range of scholarly interventions and associated institutional innovations have thought/ practiced cosmopolitan government *as* a multi-levelled, multi-scalar, open-ended deliberative endeavour ostensibly respectful of Europe’s extant plurality in theory and practice, but this is not without its own foundational ontology *of* the autonomous, rational, reasonable *European* subject. Indeed, via an analysis of deliberative forms of *governance* in contemporary EU(rope), it is argued that such a conception of rationality or reason is – in both theory and practice – closely associated with the aforementioned (neo)liberal rationality of cosmopolitan government to the extent that such rationalities are EU(rope)’s very *condition of possibility* (Part III). The thesis demonstrates, then, that the ambiguous relationship between a ‘subject of interest’ and ‘subject of right’ is not overcome in either the theory or practice of cosmopolitan government. It concludes by postulating that there may be good ethico-political reasons for giving up the attempt to overcome such ambiguity.



## INTRODUCTION:

### THE ETHICS OF COSMOPOLITAN GOVERNMENT IN EUROPE

[W]hether Europe works as an effective system of solidarity among its members to protect them from "systemic risks", or simply sets a juridical framework to promote a greater degree of competition among them, will determine the future of Europe politically, socially, and culturally.

*Etienne Balibar*<sup>1</sup>

#### Introduction

As Balibar's above words suggest, Europe and the EU has frequently been presented in recent times as facing a critical choice. This is a choice that has been brought into sharp relief by an acute political-economic 'crisis' that threatens the union's single currency and perhaps the very future of the project itself. Such a perceived crisis and the choice associated with it, is, according to many prognoses, the consequence of the prevalence of 'the market' in Europe and beyond. For others, this crisis is a consequence of *too much* government; in other words, a failure to sufficiently respect the signals issued to government by 'the market'. The invocation of 'the market' – particularly as financial market – has certainly been omnipresent in media discussions of Europe at the end of the first decade of the current millennium. On the one hand, 'the market' is presented as that to which EU nation-states must collectively respond; in this sense it is the very *telos* of government and that which dictates individual and collective identity. On the other

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<sup>1</sup> Etienne Balibar, "Europe Is a Dead Political Project," *The Guardian*, 25 May 2010.

hand, 'the market' is that which government must seek to tame; in this sense it is the servant of government and ought not be permitted to undermine supposedly deeper collective identities and solidarities. There is, then, a confusion or ambiguity at the heart of the contemporary EU project, which is starkly exposed in the contemporary news cycle. The talk of 'crisis' ought not however, lead us into the mistake of thinking that these ambiguities are something novel. Indeed, they have been at the heart of the European project since its inception and, indeed, are central to the very liberal cosmopolitan ideal that inspired it. It is such ambiguities – or such an *existential* 'crisis' - that this thesis seeks to expose and critically reflect upon via its analysis of cosmopolitan government in Europe.

This thesis is, then, a work of critical political theory, which seeks to interrogate the aforementioned ambiguities of cosmopolitan government. It interrogates cosmopolitanism via an analysis of its governmental discourses, where discourse embodies a complex array of *a priori* knowledges and practices – *assemblages* or *diagrams* - that frame both the 'seeable' and the 'sayable'.<sup>2</sup> In that sense it contributes to a broad burgeoning literature that critically approaches cosmopolitan forms of government, both as theory and practice. This is a literature which sits across traditional disciplinary boundaries in the social sciences, with scholars from sociology, political theory, international relations, international political economy as well as an array of other sub-

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2 Understanding discourses in line with Foucault as always embodying not only words, but also a combination of a priori knowledges and practices that, via power relations, frame the 'seeable and the sayable'. See, Michel Foucault, "The Order of Discourse," in *Untying the Text: A Post-Structuralist Reader*, ed. Robert Young (Routledge, 1981). ; Derek Hook, "Discourse, Knowledge, Materiality, History: Foucault and Discourse Analysis," *Theory Psychology* 11, no. 4 (2001).

disciplines, embarking on this critical endeavour. It is a literature whose objects of critique are consequently diverse; *inter alia*, 'global governance', 'global capitalism', 'globalisation', 'neo-liberalism', 'global democracy', 'global governmentality', 'global justice' or 'post-national politics'.

That these various and potentially divergent labels can each appropriate 'cosmopolitanism' speaks to its capacity to be consumed or appropriated by a singular and exclusive discourse or rationality; its potential, ultimately, for violence or domination. This thesis will seek to highlight these potential cosmopolitan violences as they are manifest in discourse – the interplay of theory and practice - and in so doing expose the limits of cosmopolitanism as ethical corrective or panacea. Conversely, the fact that 'cosmopolitanism' at the same time constitutes an umbrella under which these various labels can be gathered - despite their obvious tensions - is, I will argue, suggestive of its ethical possibilities; its capacity to be pragmatic, adapt, acknowledge ambiguities and tensions and live with uncertainty. The thesis will scrutinise, then, both cosmopolitanism's limits and possibilities; in that sense it is a deconstructive but also (necessarily tentative) reconstructive, endeavour.

As noted, this thesis is also about Europe - its unification and its ongoing government, particularly via the institution of the European Union and its predecessors. It does not offer a comprehensive account of European integration in terms of its treaties or policy evolutions. Indeed, in many respects, the thesis does not *speak the language* of a

mainstream European studies - as further elaborated below – but this may make it of particular interest to more critically minded scholars in this area. EU(rope)<sup>3</sup> is chosen in order to illustrate the abovementioned tensions in cosmopolitan government *in practice* and the particular case-studies and events that are referred to throughout are chosen to serve this purpose. While the choice to focus on EU(rope) to think through the aforementioned cosmopolitan tensions is not a necessary one, neither is it entirely arbitrary. As an abstraction the European project is emblematic of such tensions and contemporary EU government, it will be shown, is an area within which they are constantly played out.

In philosophical terms, the idea of European unity and a cosmopolitan ethic are, of course, mutually implicated and sometimes synonymous, traceable through Kant to early Christian and classical conceptions. At the same time, the European federal ideal is always in some senses a prototype or a ‘second-best’ cosmopolitanism; as Kant stated, “[t]his idea of federalism should eventually include all nations.”<sup>4</sup> And yet, as the federal idea emerged during the inter-war years it was hopeful but also a testament to the failure of that ambitious global cosmopolitan scheme that was the League of Nations. Nevertheless, contemporaneously, EU(rope) has been conceived as the embodiment of a cosmopolitan ideal or an instance of cosmopolitanism in practice, Archibugi calling it,

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3 ‘EU(rope)’ is used throughout to refer to both Europe in general and the EU and its antecedents in particular, given the particular focus on the latter. The parentheses are suggestive of the tendency of EU as institution to conflate Europe and EU and potentially exclude a ‘non-EU’ Europe.

4 Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” (1795), <http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>. Cited in, James Tully, “The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives,” in *The Idea of Europe: From Antiquity to the European Union*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 2002).

"[t]he first international model which begins to resemble the cosmopolitan model"<sup>5</sup> and Rifkin referring to the "European Dream" as a "fully articulated vision of a global consciousness".<sup>6</sup> An array of other prominent scholars - Giddens, Habermas and Derrida among others - have publically invoked, in different ways, Europe's cosmopolitan characteristics or what Ian Manners terms its 'normative power'.<sup>7</sup> From within the institutional architecture, former trade commissioner and current chief of the World Trade Organisation (WTO), Pascal Lamy, has talked of the importance of a 'cosmopolitics'. For Lamy, "cosmopolitics describes a new world that is coming into being. But in part, cosmopolitics is needed in this new world to organise and mediate between different interests". It is, then, both immanent social reality and governing ideal. Lamy consciously deploys 'cosmopolitics' in place of 'governance', which, he says, "sounds a little too much like 'control'".<sup>8</sup> And yet, cosmopolitanism in both theory and practice is, this thesis will argue, always about *government and power*, even as it sometimes refuses a discourse of 'control' in the very deployment of the softer 'governance'. Again, the fissures and divergences in these evocations of a 'normativity' or cosmopolitanism in Europe is of central interest. While both 'cosmopolitanism' and 'Europe' are sometimes conceived as unproblematic normative palliatives to contemporary problems, there is an

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5 Daniele Archibugi, David Held, and Martin Kohler, *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford: Stanford University Press 1998). p.219. Ulrich Beck and Anthony Giddens, "Nationalism Has Not Become the Enemy of Europe's Nations," *The Guardian*, October 4 2005, Jürgen Habermas and Jacques Derrida, "February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe," *Constellations* 10, no. 3 (2003). Erik O. Eriksen, "Towards a Cosmopolitan EU?," in *ARENA Working Paper No.9* (Oslo: 2005).

6 Chris Rumford, ed., *Cosmopolitan Europe* (Liverpool University Press, 2007). p.7

7 Ian Manners, "Normative Power Europe: A Contradiction in Terms?," *Journal of Common Market Studies* 40, no. 2 (2002), ———, "Normative Power Europe Reconsidered: Beyond the Crossroads," *Journal of European Public Policy* 13, no. 2 (2006).

8 Pascal Lamy, "Harnessing Globalisation: Do We Need a Cosmopolitics?," ed. European Commission (1st February 2001).

uncertainty at the heart of both which this thesis seeks to both expose and, thereafter, value.

Theoretically and methodologically, the thesis is inspired by the work of Michel Foucault – a French philosopher famous for his genealogies of such varied phenomena as madness, sexuality and the prison. It draws from his conceptual toolkit and, in particular, extrapolates from his own genealogy of ‘liberal government’ in order to critically illuminate and think through the knowledges and practices at the core of a cosmopolitan government and its inherent power relations.<sup>9</sup> A Foucauldian approach is chosen for particular reasons; his own analysis of liberal government focuses on, but is in no way wed to, the nation-state and can be extended to the consideration of various cosmopolitan manifestations, including at the European level where post-national government is most developed to the extent that it is often regarded as a *sui generis* entity or, simply, a ‘freak’ of world history.<sup>10</sup> In this sense, I would endorse William Walters’s assertion that the uniting of EU studies and Foucault’s thought constitutes a ‘mutually beneficial encounter’.<sup>11</sup> I would claim that Foucault’s work in general – and in particular his turn to liberal government - encourages a post-disciplinarity or epistemological and

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<sup>9</sup> I refer here to his recently published lectures on liberal government. Michel Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79* (Basingstoke: Palgrave Macmillan, 2008). Note that the term governmentality has been understood in a variety of ways and there is some ambiguity in Foucault’s own use of the term. It is here understood as synonymous with the emergence of what he elsewhere terms ‘liberal government’ in the eighteenth century. See, in particular, ———, "Governmentality," in *The Foucault Effect : Studies in Governmentality : With Two Lectures by and an Interview with Michel Foucault*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991). See also, William Walters and Jens Henrik Haahr, "Governmentality and Political Studies," *European Political Science* 4 (2005).

<sup>10</sup> Ulrich Beck and Edgar Grande, *Cosmopolitan Europe* (Cambridge: Polity Press, 2007).p.28.

<sup>11</sup> In this regard, I would highly recommend: William Walters and Jens Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* (Routledge, 2005).

ontological reflexivity that a thorough consideration of the politics and ethics of post-national entity such as EU(rope) demands.<sup>12</sup> There are also a host of related methodological and ethical reasons for drawing inspiration from Foucault, as discussed in greater detail below. For now it is worth emphasising, with Amoore, that "[f]or Foucault, critique is not that which seeks out resolution, reconciliation or the smoothing out of difficulty, but rather that which discomforts and unsettles one's sense of certainty."<sup>13</sup> In the context of EU studies, his work has, then, as Diez says, "enabled the formulation of a critical position that does not fall into the pro-/anti-European trap."<sup>14</sup>

The remainder of this introductory chapter proceeds in five parts. The first section provides the rationale for a consideration of cosmopolitanism and, in particular, the move to a consideration of 'cosmopolitan government', via a description of Foucault's particular conceptualisation of government as 'the conduct of conduct'. The second provides a brief overview of the central thesis and presents the key research questions. In particular, this section introduces the two major rationalities of cosmopolitan government that it is contended were constitutive of and continue to be prominent in European-level government – namely, a 'market' and a 'legal' cosmopolitan rationality – and sketches their manifestations in contemporary scholarship and practice. The third section describes the contribution of the thesis, which, above all, lies in its deployment of a Foucauldian methodology in order to consider the question of cosmopolitan government

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12 For a similar argument, see, for instance: Ben Rosamond, "Globalization, the Ambivalence of European Integration and the Possibilities for a Post-Disciplinary EU Studies," *Innovation: The European Journal of Social Science Research* 18, no. 1 (2005).

13 Louise Amoore, "Foucault against the Grain," *International Political Sociology* 2, no. 3 (2008). p.274.

14 Thomas Diez, "Michel Foucault and the Problematization of European Governance," *International Political Sociology* 2, no. 3 (2008). p.268.

in Europe. In that sense it potentially speaks to a range of literatures in the disciplines of IR, IPE, Political/ Legal Sociology and European Studies. In particular, though, it, (i) offers an *engaged* critique of a cosmopolitan international political theory, particularly as it has been applied to the question of Europe and (ii) it offers something new to a Foucauldian IR/European Studies via its engagement with and juxtaposition of Foucault's recently published lectures on liberal political economy and security. In the fourth section I foreshadow the major conclusions of the thesis and their implications for the ethics of cosmopolitan government in Europe. In particular, it is noted that the *inherent ambiguity* in the relationship between the two major rationalities of cosmopolitan government considered and the subjectivities that they imagine, might, from a Foucauldian perspective, be thought of as ethical resource rather than something to be overcome. Finally, I provide a brief outline of the subsequent parts of the thesis.

### **From Cosmopolitanism to Cosmopolitan Government**

While cosmopolitanism encapsulates the idea of a transcendence of spatial and cognitive boundaries, it can be used to describe a profusion of startlingly different conceptions of politics, ethics and identity. Thus, the very identity 'cosmopolitan' might be associated with jet-setting entrepreneur; multi-cultural city; trans-national NGO; international organisation; or even glamour magazine! As a contemporary political or governmental agenda, cosmopolitanism can inform the promotion of trans-national or global justice, trans-national or global democracy, trans-national or universal human rights and world peace. Such agendas differ in terms of both their spatial imaginaries and political rationalities and they are not necessarily convergent or compatible. Cosmopolitanism is



not, then, a tight doctrine or programme. Moreover, its advocates operate at a variety of levels of abstraction and in different scholarly fields. Some emphasise the importance of a universal ideal or consensus, whereas others put the accent on the pluralist or difference respecting aspect of cosmopolitanism. Many seek to establish a 'both-and' vision which combines aspects of the universal and particular. This leads to a situation where cosmopolitanism can be associated both with the transcendence of sovereign identity and the assertion of its ethical importance. Fine illuminates this apparent confusion:

In one case they begin by asking specific questions on important matters, for example, the prevention and punishment of genocide, and end with the utopian project of overcoming the structures of wealth and power associated with the modern system of nation-states. In another, their project appears liberal or even conservative, designed to make fine adjustments to international institutions in the hope that all will then be well with the world. Sometimes they look utopian and liberal at the same time: constructing a new world order and expressing the phenomenology of a privileged class whose experience of global mobility is a far cry from that of stateless refugees.<sup>15</sup>

Similarly, Pollock et al. say of cosmopolitanism, "[w]e are not exactly certain what it is, and figuring out why this is so and what cosmopolitanism may be raises difficult conceptual issues." There is substantial disagreement within cosmopolitan scholarship, among cosmopolitan thinkers and in cosmopolitan practices regarding both the substantive content (polis) and spatial scope (cosmo) of any 'cosmo-polis'; it is multi-

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15 Robert Fine, *Cosmopolitanism* (London; New York: Routledge, 2007).p.1

faceted, it has, as Mignolo says, 'many faces'.<sup>16</sup> It has consequently been critiqued and celebrated in equal measure. As Rumford says:

Cosmopolitanism is criticised by some for its utopianism, idealism or elitism, and is taken to task for its supposed association with neo-liberalism and the values associated with 'good governance'; by others, it is commended for its critique of nationalism, its subversion of the territorialist assumptions of much contemporary social and political thought, and its potential inclusivity and embrace of 'otherness'. Cosmopolitanism, it may be concluded, can be all things to all people.<sup>17</sup>

It might be wondered, why bother with the term cosmopolitanism if it lacks unity or coherence? One reason is that cosmopolitanism, while it has never overcome its confusion, is a concept that has endured. At an abstract level, it pervades the ethics of the post-national. It is a spatial imaginary which conceived and continues to realise the identification with something beyond local affiliation; an identification with the world, the global, the beyond. It evokes a utopianism or an idealism associated with the promise of a social harmony and prosperity which transcends the nation-state or other parochial attachments. It conjures the concentric circles of Hierocles, the Kantian promise of a perpetual peace, the idealism of a League of Nations and, for some, the reality of European Union. On another, more grounded, level – and yet never entirely divorced from the abstract – cosmopolitanism can be understood as motor of and/or palliative to processes of globalisation and Europeanisation. For some these very processes epitomise an immanent cosmopolitanism; they are evidence of the ongoing realisation of a Kantian cosmopolitan promise. From this perspective, cosmopolitanism and

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16 Walter D Mignolo, "The Many Faces of Cosmo-Polis: Border Thinking and Critical Cosmopolitanism," *Public Culture* 12, no. 3 (2000).

17 Rumford, ed., *Cosmopolitan Europe*, p.1.

interdependence/globalisation are understood to co-exist in a mutually reinforcing virtuous circle. For others, while the nation-state is being transcended in important ways, a perpetual peace or social harmony does not seem any closer. From this perspective, cosmopolitanism is, to paraphrase Derrida, a 'cosmopolitanism to come'; an ethical ideal to which we might aspire.

For all its uncertainty, "today cosmopolitan thinking plays an indispensable part in the social sciences".<sup>18</sup> As stated above, and more significant for this thesis, I believe that such thinking has been both constitutive of and central to contemporary forms of post- or trans- national government. Indeed, cosmopolitan thinking and knowledge has, via various technologies or assemblages of government, been instrumental in the *designation, production and ongoing management and reform* of phenomena such as Europeanisation and globalisation. Given its eclecticism cosmopolitanism is thought in the plural throughout the thesis. Indeed, we might, as Fine suggests, do well to remove the 'ism' from cosmopolitanism, but to dispense with it altogether would be to ignore its continued practical relevance; its *power* as framing discourse.<sup>19</sup>

In the case of this thesis, the 'ism' is indeed, for the most part dropped and cosmopolitanism becomes cosmopolitan 'government' and, at times, cosmopolitan 'rationalities'. In accordance with Foucault's understanding, the term government is used purposefully, in place of the more fashionable, *governance* which pervades

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18 Robert Fine, "Taking the 'Ism' out of Cosmopolitanism: An Essay in Reconstruction," *European Journal of Social Theory* 6, no. 4 (2003), p.466.

19 Ibid.

discussions in the social sciences. Government is intimately connected with – indeed, a central contemporary manifestation of – the concept of power for Foucault; as he says, “power is less a confrontation between two adversaries or the linking of one to the other than a question of government.”<sup>20</sup> Foucault defines government as encapsulating all aspects of ‘the conduct of conduct’, ranging from the government of the self to the governing of others. The term conduct alludes to both leading others and “a way of behaving within a more or less open field of possibilities.”<sup>21</sup> As Gordon says, “[g]overnment as an activity could concern the relation between self and self, private interpersonal relationships involving some form of control or guidance, relations with social institutions and communities and, finally, relations concerned with the exercise of political sovereignty.”<sup>22</sup> Similarly, power is conceived as relational, it is,

...an action upon an action, on existing actions or on those which may arise in the present or the future.... [A] power relationship can only be articulated on the basis of two elements which are equally indispensable if it is really to be a power relationship: that ‘the other’ (the one over whom power is exercised) be thoroughly recognized and maintained to the very end as a person who acts; and that, faced with a relationship of power, a whole field of responses, reactions, results, and possible inventions may open up.<sup>23</sup>

Hence, as Gordon puts it, “power is only power when addressed to individuals who are free to act in one way or another”.<sup>24</sup> Or as Foucault himself says, “[p]ower is exercised

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20 Michel Foucault, “The Subject and Power,” *Critical Inquiry* 8, no. 4 (1982). p. 789.

21 Ibid. p.789.

22 Colin Gordon, “Governmental Rationality: An Introduction,” in *The Foucault Effect : Studies in Governmentality : With Two Lectures by and an Interview with Michel Foucault*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991). p.2.

23 Foucault, “The Subject and Power.” p.789.

24 Gordon, “Governmental Rationality: An Introduction.” p.5.

only over free subjects, and only insofar as they are free." And later: "at the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom."<sup>25</sup> The understanding of government as this specific conception of power explains my use of the term in place of the all pervasive *governance*.<sup>26</sup> *Governance* represents nothing new when *government* is considered in such general terms; it loses its novelty as well as its sometimes unassuming benignity. Conceived as one among many strategies or technologies of government, governance can itself be considered as an object of analysis and a consequence of a particular cosmopolitan rationality, as discussed, in particular, in Part III. In summary, then, the uniting of cosmopolitanism and government as 'cosmopolitan government' refers to the ways in which governmental activity or power relations of the sort described have been founded upon cosmopolitan rationalities or governmentalities.

At the same time, it denotes something more specific: the extension of *liberal* modes of government into the *post-national* arena. This liberal mode of government is, for Foucault, rooted in the shift from *raison d'état* towards political economy between the sixteenth and eighteenth centuries. It was, in particular, the emergence of the concept of *population* in the eighteenth century, which for Foucault permitted the emergence of an art of government outside of the juridical framework of sovereignty. This is what Foucault terms 'biopolitics', whereby population – its *welfare* or very *life* - becomes the

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25 Foucault, "The Subject and Power." p.790.

26 In global governance, European governance (note journal data) In the past decade or so, the number of references to governance in EU related journals has mushroomed. See Markus Jachtenfuchs, "The Governance Approach to European Integration," *JCMS: Journal of Common Market Studies* 39, no. 2 (2001).

end of government and also its means.<sup>27</sup> Whereas *the disciplines* that Foucault discussed extensively in his *Discipline and Punish* were concerned with the management or control of *individuals*, biopolitics is concerned with the management of the *masses*, the population in general. Of course, the constitution of a biopolitics is inseparable from a knowledge of all the processes of population in its larger sense; these include biology and political economy both of which, in turn, utilise and develop technologies such as statistics. It ought to be emphasised, however, that biopolitics does not displace the disciplines; indeed, in certain respects it generalises and centralises them. The emergence of a distinctly liberal form of biopolitics rooted in a liberal political economy is traced in detail in Chapter 1. For now, suffice to say that the government of the state from the eighteenth century onwards is informed by a set of knowledges which question and seek to limit the extent of state government in order that the state's very productivity and power might be enhanced. It does so because of its insight that government is ineffective and even counter-productive in a number of ways when it comes to seeking to control a *delicate natural order* of individuals and, indeed, this control may be a barrier to the flourishing of the population.<sup>28</sup> This understanding of the population as a natural domain operating in accordance with its own laws requires that it be *better* understood. It will be argued that it is, in particular, the extension and development of liberal rationalities of government

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27 Foucault, "Governmentality." p.100.

28 As Foucault says, "[I]f there is a nature specific to the objects and operations of governmentality, then the consequence of this is that governmental practice can only do what it has to do by respecting this nature. If it were to disrupt this nature, if it were not to take it into account or go against laws determined by this naturalness specific to the objects it deals with, it would immediately suffer negative consequences." ———, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.16. See also, ———, "Governmentality." And Barry Hindess, "Politics as Government: Michel Foucault's Analysis of Political Reason " *Alternatives* 30, no. 4 (2005).

which have been both constitutive of and informed what I call cosmopolitan government in Europe.

Foucault's analysis is not only instructive in the sense that it gives substantive content and historical context to the notion of modern cosmopolitan government via its elucidation of liberal government. It is also, as implied, adaptable to the post-national context. Indeed, unlike Foucault's own analyses, his concept of government is not necessarily wed to the nation-state. On the contrary, in focusing on the central importance of government and power, the approach is easily transferable to questions of politics above and beyond the state and EU(rope) can be regarded as just such a question and arguably a testament to Foucault's own scepticism towards approaches that privilege the state. Foucault is explicitly not, like Marxist theorists of state, seeking to discern or uncover the inherent propensities or biases of the state. The state "does not have this unity, this individuality, this rigorous functionality, nor, to speak frankly, this importance".<sup>29</sup> For Foucault, the state has no essence and any coalescence of power relations within the state is a contingent phenomenon. Indeed, the state is an ever evolving function of changes in power relations or practices of government.<sup>30</sup> Conversely, as Osborne et al., put it, any apparent, "'retreat from the State' is also itself a positive technique of government; we are perhaps witnessing a "degovernmentalization

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29 Foucault, "Governmentality." p.103.

30 Gordon, "Governmental Rationality: An Introduction." p.3. For Foucault, "one must analyze institutions [such as the state] from the standpoint of power relations, rather than vice versa, and the fundamental point of anchorage of the relationships, even if they are embodied and crystallized in an institution, is to be found outside the institution." Foucault, "The Subject and Power." p.791.

of the State", but surely not "de-governmentalization" *per se*.<sup>31</sup> Certainly, this thesis would seek to make such a claim with regards to cosmopolitan government and European government in particular. While Foucault has been critiqued for considering only the emergence of governmentality at the level of the state and his insights in this area have subsequently been applied primarily to discussions of governmentality within the state<sup>32</sup>, it seems clear that Foucault's conceptualisation, given its emphasis on particular rationalities or modes of knowledge, is easily transposed to the post-national.<sup>33</sup> Indeed, a number of authors in international theory have recently begun to do so, as I will return to below.<sup>34</sup>

Similarly, this thesis will seek to trace a liberal governmentality as it transcends the nation-state and manifests in European level government as a cosmopolitan rationality. While it is argued that this particular liberal governmentality - emerging out of classical liberal doctrine in the eighteenth century - is of central importance to EU(rope), which is not to say that it is a singular or all-pervasive rationality. Indeed, another rationality of liberal government, rooted in a sovereign conception and drawing on the imaginary of social contract is also very present in the contemporary government of Europe. Moreover, the contemporary attempt to extrapolate these sovereign-juridical rationalities

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31 Andrew Barry, Thomas Osborne, and Nikolas S. Rose, *Foucault and Political Reason : Liberalism, Neo-Liberalism, and Rationalities of Government* (Chicago: University of Chicago Press, 1996). p.11.

32 Barry Hindess, "Liberalism - What's in a Name?," in *Global Governmentality*, ed. Wendy Larner and William Walters (London: Routledge, 2004). See also, Nikolas S. Rose and Peter Miller, *Governing the Present : Administering Economic, Social and Personal Life* (Cambridge: Polity, 2008).

33 Hindess, "Politics as Government: Michel Foucault's Analysis of Political Reason ".

34 Walters and Larner note the paradox that governmentality studies and globalization studies emerged in 1990s, but didn't connect up. Wendy Larner and William Walters, *Global Governmentality : Governing International Spaces*, Routledge Advances in International Relations and Global Politics, 28 (London; New York, NY: Routledge, 2004). p.5.



– democracy, human rights, social justice and so forth - to the post-national or cosmopolis is traceable to a Kantian cosmopolitan right. Following Foucault, it will be argued that these sovereign or legal rationalities are ontologically distinct from the political economy or market rationalities which constituted a specific biopolitics in the eighteenth century. However, in the context of concrete instances of cosmopolitan government, these rationalities combine, are sometimes mutually supportive and sometimes antagonistic. This is to follow Foucault, who – contrary to some readings of his later work on government – was clear that sovereign power was not simply displaced by a liberal governmentality.<sup>35</sup> Extrapolating from Foucault - and illustrating with an analysis of various discourses of European government - the thesis identifies, then, two faces – or, to use Deleuze’s term, *diagrams* - of liberal government at play. What I call a *market* and a *legal* cosmopolitan rationality.

### **Central Thesis: Two Faces of Cosmopolitan Government in/of Europe**

#### *Market Cosmopolitan Government*

While in theory cosmopolitan government could draw on a number of particular rationalities, this thesis argues that it is a liberal market rationality, rooted in an ontology

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35 See, for example, Agamben and many that use him in IR – Foucault is clear that sovereign power is still present and not displaced by biopower. He is, rather, interested in the manner in which biopower functions through sovereign power or the manner in which biopower alters the rationalities of sovereign power. See, for example lecture of 17 March 1976 in Michel Foucault, *"Society Must Be Defended" Lectures at the Collège De France, 1975-76* (New York: Picador, 2003). (especially pp.258-). For further discussion and elaboration of these points see also Chapter 4.

of the rational self-interested (or utility maximising) subject, that has been decisive in its manifestation in practice, particularly in Europe. This 'subject of interest' has made possible market cosmopolitan government and provides its very *telos*.

It is the notion of market – as *common* or *single* market – which has, above all, constituted and called forth a space of government beyond parochial bonds; it was the functional(ist) enlargement of markets which both embodied and precipitated cosmopolitan government in Europe in the aftermath of war. The market - as unfettered commerce, as the promise of increased prosperity and peaceful relations – is, then, that which offered the *very possibility* of cosmopolitan government in Europe and, to a large extent, is that which continues to denote cosmopolitan government's *limits* and its very *telos*. This thesis seeks to make clear the ethics – the particular rationalities and subjectivities - and contingencies involved in the emergence of this market cosmopolitan government in the European context through an application of Foucault's aforementioned genealogy of liberal government.

In particular, adopting a genealogical approach, Part I of the thesis provides an analysis of the constitutive role of classical and neo-liberal thought in *conceiving of* and thereafter *realising* a space of post-national government. Implicit in this analysis is the claim that the perpetuation of this knowledge on market cosmopolitan government in EU(ropean) studies and in EU(ropean) practice has played a crucial *performative* role in its spatial

realisation in post-national government, including in the very reality that is the EU.<sup>36</sup> It is through tracing this liberal mode of government through its German neo-liberal (or 'ordo'-liberal) reformulations and beyond that this thesis demonstrates the ways in which both certain mainstream contemporary scholarship (discussed below) and, more importantly, concrete practices of cosmopolitan government, were framed and enjoined to operate within particular discourses. Indeed, such rationalities became enshrined in the treaties and deepened through institutional practices (see Chapter 2) and were at the heart of the establishment of an *economic constitution* at European level.

Moreover, given that a cosmopolitan market rationality acts as the condition of possibility for the contemporary EU, oppositional rationalities are also to a large extent enjoined to operate within this rationality; within this *economic constitution*. On the one hand, this makes it difficult to assert an alternative political constitution for EU(rope); a constitution, in other words, that resembles nation-state constitution and might enable the formation of a 'social EU(rope)' (associated with a 'statist-legal' cosmopolitan rationality, described below and in Part II). On the other hand, proposals for 'good governance' in the EU (rooted in a 'deliberative-legal' cosmopolitan rationality discussed below and in Part III) - while they seek to escape the imaginaries of both market and state – can end up privileging a notion of social policy which defers to an economic constitution. In particular, the predominance of a market cosmopolitan rationality in EU(rope) has led to the promotion of 'subjects of interest' – in particular the

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36 For a similar argument see Thomas Diez, "Speaking 'Europe': The Politics of Integration Discourse," *Journal of European Public Policy* 6, no. 4 (1999).

*entrepreneurial subjects* privileged in neo-liberal thought (see Chapter 1) – in the realities of contemporary EU discourses (Chapter 6).

This is not, however, to argue, as would certain historical materialist scholars (see, for instance, the discussion of Gill in Part I), that the constitutionalisation of a market cosmopolitan rationality entirely closes the possibilities for resistance. Indeed, as discussed with reference to Foucault's genealogy of liberal government in Chapter 1, a margin for resistance exists by virtue of the very requirement of liberal government to *govern through freedom*; in other words, subjects are afforded a space of uncertainty necessary to become capable of managing their own destinies, but that is not to guarantee the realisation of particular "subjects of interest" (see Chapters 1 and 6). More concretely, and as mentioned above, in the case of cosmopolitan government in EU(rope), an oppositional, legal cosmopolitan, discourse is present in both theory and practice.

### *Legal Cosmopolitan Government*

Complicating the market cosmopolitan picture in accordance with Foucault's own genealogy, the thesis is clear, then, that contemporary liberal government has another foundation, which has also found its way into the post-national - into *cosmopolitan* government - and that is the juridical imaginary of *social contract* rooted in a sovereign imaginary and associated conception of right or law. It is underpinned in an ontology which conceives of subjects as capable of thinking beyond self-interest and coming together to consider a public-interest which leads to a consensus manifest in a 'social' contract, a constitutional settlement or democratically arrived at policy output. These

“subjects of right” are both the condition of possibility for legal cosmopolitan government and its very *telos*.

Such a rationality of government is geared towards inclusiveness, participation and democracy. It is a rationality of government that was originally associated with the spatial organisation of the sovereign state and its granting of civil, political, economic and social rights to its subjects; their constitution as *citizens*. Post-nationally, such a rationality is manifest in the extension of participatory and democratic forms to decision making processes beyond the nation-state and in the assertion of *justice* in global governance. At the level of European government such a rationality can be traced in, *inter alia*: the emergence of the legal order associated with the Council of Europe (and the European Convention on Human Rights (ECHR) and Court (ECtHR)) and, later, the EU’s promotion of human rights and democratic participation; the EU’s emphasis on a constitutional settlement that extends beyond the economic to promote a ‘social’ Europe; its conception of EU citizenship; its (necessary) interplay with the redistributive policies of its member states; and its own redistributive schemes, particularly in agricultural and regional policy.

A legal cosmopolitan rationality to some extent, then, seeks to reproduce the institutions associated with nation-state – especially a (political) constitution, possibly accompanied by a parliament – beyond the nation-state. There are affinities here with a cosmopolitan democracy literature – discussed below - that seeks to institutionalise democracy beyond the nation-state as a response to globalisation and the market cosmopolitan rationalities that underpin it. In this thesis, I refer to such a position as a ‘statist-legal’ cosmopolitan

rationality, as reflected in the below research questions. In particular, I illustrate such a rationality via an analysis of Habermas's thinking on EU(rope) and illuminate its practical effects with reference to French discourses on European-level government. Both, I argue, seek to generalise the (neo)-republican nation-state and the (neo)-republican citizen in the post-national realm (Part II).

Not all legal cosmopolitan proponents seek the establishment of such institutions, concerned that to do so would simply reproduce the problems of the nation-state – particularly its exclusionary tendencies – in post-national form. Instead, they seek to imagine and institutionalise a more flexible and participatory form of governance beyond the state that is not rooted in a formal institutionalisation or constitutionalisation of particular values. In practice, as discussed in Part III, this involves the promotion of an experimental or reflexive deliberative form of governance that promotes the inclusion in decision making of all those that might be affected by a given decision or policy. Such a rationality is illustrated in this thesis with reference to the European Commission's own reflections on 'governance', its attempt to include civil society in decision making in a transparent fashion, and in its practice of soft governance with its 'open method of co-ordination' (OMC). What I term a 'deliberative-legal' cosmopolitan rationality of government can be associated with a burgeoning radical pluralist literature, briefly discussed below and throughout Part III.

A central insight of this thesis is, as alluded to above, that, on the one hand, the condition of possibility for both of these legal cosmopolitan rationalities of government is the market cosmopolitan rationality that constituted the post-national space of government

that is EU(rope). On the other hand, such rationalities are often promoted in direct opposition to the development of a 'market' EU(rope). Thinking through these oppositional discourses as they manifest in EU(rope), it is possible to identify and explore the ambiguous relationship between 'subject of interest' and 'subject of right'.

### *Research Questions*

This thesis seeks to explore the difficult relationship between the aforementioned governing rationalities in practice in the government of EU(rope). Its central research question is thus the following: What ethics does cosmopolitan government in Europe promote and how do these interact in practice? A focus on ethics involves, from a Foucauldian perspective (as alluded to in the previous section and fleshed out below), an assessment of the subjectivities or identities underpinning and promoted by the various strands of cosmopolitan government identified in the foregoing analysis. Such an assessment allows for an exploration of the *effects* and *conditions* of cosmopolitan government in practice. The central research question consequently encompasses the more specific questions:

- How and to what extent has a market cosmopolitan rationality emerged in the theory and practice of European level government and what subjects does such a rationality seek to realise?
- How and to what extent has a 'statist-legal' cosmopolitan rationality emerged in the theory and practice of European level government and what subjects does such a rationality seek to realise?

- How and to what extent has a 'deliberative-legal' cosmopolitan rationality emerged in the theory and practice of European level government and what subjects does such a rationality seek to realise?

In terms of the organisation of the thesis, these three sub-questions relate directly to its three part structure (see outline below). However, the governmental rationalities to which they refer are not considered in isolation from one another. Indeed, the most important part of the central research question is its interest in the relationships between these rationalities and the subjects that they promote in practice.

It is, as noted, the examination of these relationships - the complementarities and tensions between these governmentalities as they manifest in theory/practice – that constitutes the major contribution of the thesis. An *embedded*, Foucauldian-inspired, reflection on this *ambiguous relationship* is the primary contribution of this thesis. Such reflections may be of interest to a range of extant literatures, particularly an international political theory, as discussed in the following section.

### **Contributions to the Literature: Foucauldian Methodology *on* Ethics**

The major contribution of this thesis – implicit in the foregoing – lies in its Foucauldian engagement with cosmopolitan government in Europe. Given its breadth, there will be something of interest in this thesis for a range of IR, IPE and European studies literatures. Consequently, it is impossible to cite all of the possible contributions that it could



conceivably make. Nevertheless, in this section I point to some of the key contributions. I first discuss Foucault's methodology and attempt to illuminate the ways in which such a methodology both contributes towards and offers a critique of certain extant cosmopolitan literatures in international political theory and European studies. I subsequently set this thesis in the context of the extant Foucauldian literature in IR/European Studies and suggest that its novelty vis-à-vis such literatures lies in its focus on another, largely untapped, Foucault.

### *Foucauldian Methodology and International Political Theory*

Foucault's various analyses are concerned with looking at the history of the set of rules that, during a given period, "enable one to establish which statements in a given discourse can be described as true or false". The mode of critique he is interested in "would consist in determining *under what conditions* and *with what effects* a veridiction is exercised."<sup>37</sup> Thus, he is not interested in identifying how a particular regime is oppressive due to its falsity. He is not interested in holding up a prevailing structure – such as a liberal form of government - as it is manifest in practice to some true model, sanctified with reference to a particular knowledge, and then re-rendering this structure in the terms of that knowledge. As he says, "a history of truth should not be understood in the sense of a reconstruction of the genesis of the true through the elimination or rectification of errors."<sup>38</sup> Indeed, the concept of error has little meaning in his particular

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<sup>37</sup> Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*, p.35

<sup>38</sup> Ibid.

historicism; a practice of government can only be erroneous on the basis of its fit with an always contingent and never entirely unitary prevailing rationality. His preoccupation is, rather, with bringing to light the conditions that allowed a particular regime of veridiction to emerge and the impact of its exercise. He is interested, essentially, in the way in which ideas and history interweave and implicate each other through the shifting nexus of power/knowledge. Similarly, I am interested in tracing, highlighting and problematising a variety of 'truths' or 'ethics' associated with cosmopolitanism as they are manifest in concrete governmental schemes. The task of denaturalisation is not, however, about claiming that these truths are false; rather, it draws attention to the ways in which these concrete manifestations have particular, and potentially violent, impacts on human subjects that may not generally be recognised. These truths rely upon, produce and promote particular subjectivities and exclude others. These truths *act* through relations of power and sometimes domination.

Foucault's method – as well as his abovementioned conceptualisation of power and government as relational - demonstrates that he is not intent on the establishment of ethics as something definitive, but he is, nevertheless, *interested in ethics*. Ethics is conceived as the interplay of regimes of veridiction or discourses – in other words, particular technologies and domains of practice and power/knowledge or *diagrams* - and the impacts that these may have in all their complexity and contingency. This approach enjoins us to *suppose* that universals do not exist, although it is not to maintain in any categorical fashion that they do not. It is the very *claims to universality* and the technologies and practices associated with them which represent the empirical *objects* of this method of research; it is not a matter of believing in certain universals or not.

Having said that, the output of such research often leads at the very least to a certain scepticism vis-à-vis universal claims; even if we believe in something called the material world, we begin to wonder about the way in which it is accessed or understood at a given moment in time and appreciate the omnipresence, for better or worse, of power/knowledge. As Foucault says,

[I]f the Kantian question was that of knowing what limits knowledge must abstain from transgressing, it seems to me that the critical question today has to be turned back into a positive one: in what is given to us as universal, necessary, obligatory, what part is taken up by things which are actually singular, contingent, the product of arbitrary constraints?<sup>39</sup>

In the context of this thesis, we might, in accordance with this Foucauldian question, ask to what extent our rationalities of cosmopolitan government in Europe – so often presented via scholarship and institutional practices as *universal, necessary, obligatory* – are revealed to be *singular, contingent, the product of arbitrary constraints*. To what extent are the transcendent ethical promises of both market and legal cosmopolitan government and their various corollaries found to be ethically problematic, constraining; to what extent might they move *beyond power and government to dominate* us, in Foucault's specific sense of that term as denoting a situation where the 'margin of liberty is extremely limited'. We could, however, still wonder how we might carry out this critique, this de-reification. Foucault continues:

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39 Michel Foucault, "What Is Enlightenment?," in *The Foucault Reader*, ed. Paul Rabinow (London: Penguin Books, 1984).p45-46

The point... is to transform critique conducted in the form of necessary limitation into a practical critique that takes the form of a possible transgression... Criticism is no longer going to be practiced in the pursuit of formal structures with universal value, but rather a historical investigation into the events that have led us to constitute ourselves and recognise ourselves as subjects of what we do, think and say. [Such a critique] will be genealogical in the sense that it will not deduce, from the form of what we are, what it is possible for us to do and to know; but it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing or thinking what we are, or do or think. It is not seeking to make possible a metaphysics that has finally become a science; it is seeking to give new impetus, as far and as wide as possible, to the undefined work of freedom.<sup>40</sup>

Taking inspiration from this methodology of practical critique *as possible transgression*, the thesis attempts to provide a genealogy of the aforementioned forms of cosmopolitan government which is, throughout, part historical investigation and part analysis of the limits of contemporary discourse which this very history has precipitated in the present. It seeks to provide a 'history of the present' which exposes elements of that present that are taken for granted – governmental practices and the ontologies that underpin them – as themselves contingent upon a complex interplay of power/knowledge.<sup>41</sup> Such a genealogy is not, and cannot be, a definitive history; it is, as Elbe notes, "'episodical' in the sense that it restricts itself to those historical episodes that are of decisive importance in seeking to understand [that] phenomenon in the present, which is singled out as being problematic."<sup>42</sup>

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40 Ibid.p45-46

41 As Bartelson notes, a genealogy describes "how the present became logically possible". Jens Bartelson, *A Genealogy of Sovereignty*, Cambridge Studies in International Relations, 39 (Cambridge: Cambridge University Press, 1995). p.8.

42 Stefan Elbe, "'We Good Europeans...': Genealogical Reflections on the Idea of Europe," *Millennium - Journal of International Studies* 30, no. 2 (2001). p.262.

This thesis conducts a 'history of the present' of the very post-Kantian cosmopolitan discourses that, to paraphrase Foucault, *conduct critique in the form of necessary limitation*.<sup>43</sup> I concur, then, with Hutchings that, "[u]niversal ethical principles of a liberal Kantian kind are inextricable from a complex history. The conditions of possibility for the realization of such principles... have the potential to subvert them, and their realization will always imply the exclusion of other ways of being."<sup>44</sup> EU(ropean) government is a case in point of the complex history to which Hutchings refers. A genealogical examination of the rationalities which underpinned this *particular* liberal Kantian project (Part I) permits a *demonstration of the conditions of possibility* of the various Kantian inspired proposals that have both accompanied and responded to this particular project. A consideration of contemporary practices in/of EU(ropean) government (Parts II and III) is deployed in order to highlight the particular subjectivities that these cosmopolitan rationalities of government both rely upon and performatively enact, as well as those that they necessarily exclude. In this way, we also see how these cosmopolitan rationalities subvert their own ideals in their very enactment. The turn to the EU and its antecedents in order to reflect on these cosmopolitan discourses reflects Foucault's recognition that to focus on concrete practice, "is sometimes more effective in unsettling our certitudes and

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43 In this regard the thesis contributes to a critical and/or post-structural international political theory that has conducted similar critiques of cosmopolitanism, while seeking to embed such a critique in the concrete histories and contemporary realities of the government in/of EU(rope). For book length treatments see, in particular, Kimberly Hutchings, *International Political Theory: Rethinking Ethics in a Global Era* (London: Sage, 1999). Chris Brown, *Sovereignty, Rights, and Justice : International Political Theory Today* (Cambridge, UK; Malden, MA: Polity Press ; Blackwell Publishers, 2006), Molly Cochran, *Normative Theory in International Relations a Pragmatic Approach*, Cambridge Studies in International Relations (Cambridge: CUP, 1999), James Brasset, *Cosmopolitanism and Global Financial Reform: A Pragmatic Approach to the Tobin Tax*, Ripe Series in Global Political Economy (Routledge, 2010).

44 Hutchings, *International Political Theory: Rethinking Ethics in a Global Era*. p.177

dogmatism than is abstract criticism."<sup>45</sup> Such a turn also constitutes a recognition of the inseparability of theory and practice and positive and normative theory. Thus, practices that are not normally identified as cosmopolitan are considered in terms of their underlying cosmopolitan assumptions, where it is appropriate to do so. Moreover, as reflected below, a range of ostensibly positive or descriptive theories of IR and European studies are also considered in terms of their underlying normative presuppositions.

In summary, the analysis of EU and its antecedents facilitates what might be called an *embedded* or *situated* critique of a cosmopolitan international theory that frequently fails to reflect upon both its practical subjectifying effects and its associated conditions of possibility. In particular, I critically consider the categories of 'market', 'statist-legal' and 'deliberative-legal' cosmopolitan rationalities of government described in the above section and central to my research questions. These categories map, more or less, on to three kinds of *political cosmopolitanism* identified by Hutchings - a *liberal internationalism*, a *cosmopolitan democracy* and a *radical pluralism*.<sup>46</sup> I draw within these categories on a range of ostensibly normative and ostensibly positive theory for the reasons expressed above and articulated below with reference to a range of IR/European studies theory. As discussed below, the various analyses of cosmopolitan government offered expose the

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45 Michel Foucault, *Power: Essential Works of Foucault, 1954–1984*, vol. 3, ed. James D. Faubion (New York: The New Press, 2000), 323. Cited in Michael Merlingen, "Foucault and World Politics: Promises and Challenges of Extending Governmentality Theory to the European and Beyond," *Millennium: Journal of International Studies* 35 (2006). p.188.

46 See Hutchings, *International Political Theory: Rethinking Ethics in a Global Era*. pp.153-179.

limits of what Foucault terms, critique “practiced in the pursuit of formal structures with universal value.”<sup>47</sup>

### *Liberal Internationalism as Politics/Ethics: A Market Cosmopolitan Government*

The genealogy of liberal government offered in Part I speaks to a range of liberal internationalist theory in international political theory; indeed, it seeks to trace from Kant and classical liberalism the conditions of possibility of such a literature and an associated market cosmopolitan government. Take, for instance, a neoliberal institutionalist perspective in IR, which, in response to realist perspectives, emphasises, *inter alia*, that states will focus on absolute gains in the course of repeated interactions; their self interest is conceived in terms which cohere with a market rationality.<sup>48</sup> While ostensibly descriptive, the genealogy conducted in this thesis exposes that through its blinkered historicism and its unwillingness to reflect on its own performativity, such theory implicitly supports an ontology rooted in a utility maximising conception of self-interest: a ‘subject of interest’. Hence, although Moravcsik, among others, has attempted to produce a ‘non-ideological liberal international relations theory’<sup>49</sup>, this should be regarded as oxymoronic. Indeed, despite its delusions of objectivity, it is underpinned by a highly ideological conception of the history of liberal internationalism – what I term a

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47 Foucault, “What Is Enlightenment?”.p45-46

48 See, for example, Robert O. Keohane, “International Institutions: Two Approaches,” *International Studies Quarterly* 32 (1988), Robert O. Keohane and Joseph S. Nye, *Power and Interdependence : World Politics in Transition* (Little, Brown, 1977).

49 Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organization* 51, no. 04 (1997).

market cosmopolitan rationality – as an essentially pacifying unfolding. As Jahn states of his theory:

The substantive picture which emerges is thus one of linear historical development from the initial recognition of the rationality of market economy and government by consent through their progressive realization in domestic settings to their gradual change of the nature and principles of international politics. And in those areas in which the liberal principles have been most fully realized, they have led to peace, prosperity, and cooperation in international affairs.<sup>50</sup>

In the context of his EU(rope)-focused theory, Moravcsik similarly conceives of state interests in terms of rational economic calculations, promoting the idea that market expansion and deepening was, at particular (treaty-making) historical junctures, supported by all member states and therefore permitted cooperation.<sup>51</sup> Market democracies are thus conceived as the legitimate actors in both international co-operation and European integration and a market rationality is not only analytically, but also normatively privileged.<sup>52</sup> While, in contrast neo-functionalists have, since Haas<sup>53</sup>, focused primarily on the demands of non-state actors for market cosmopolitan government, such demands have – á la Moravcsik - frequently been uncritically understood as a consequence of the operation of a market rationality (see Chapter 2). Similarly, contemporary regulatory governance theorists of the EU such as Majone, highlight its market-making function or the importance of its 'output legitimacy'. Unlike a

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50 Beate Jahn, "Liberal Internationalism: From Ideology to Empirical Theory ? And Back Again," *International Theory* 1, no. 03 (2009). p.424.

51 Andrew Moravcsik, *The Choice for Europe : Social Purpose and State Power from Messina to Maastricht*, Cornell Studies in Political Economy (Ithaca, N.Y.: Cornell University Press, 1998).

52 Jahn, "Liberal Internationalism: From Ideology to Empirical Theory ? And Back Again."

53 Ernst B. Haas, *The Uniting of Europe; Political, Social, and Economic Forces, 1950-1957*, The Library of World Affairs, No. 42 (Stanford, Calif.: Stanford University Press, 1958).



mainstream integration theory, Majone's theory is less concerned to conceal its normativity; indeed, it contains the explicit assertion that the EU's function should be, primarily, to maximise market efficiencies and avoid a potentially destabilising political factionalism.<sup>54</sup>

While neoliberal institutionalists, intergovernmentalists, neo-functionalists and regulatory theorists are, in general, avowedly non-normative, the assumptions upon which they are based bear at least a trace of the Kantian recognition of a connection between the encouragement and promotion of commerce beyond nation-states and co-operation or peace among nations (see Chapter 1).<sup>55</sup> Notwithstanding their important differences, these theories seem to share the basic assertion that commerce between or beyond nations was constitutive of a European Union and should remain its ongoing *raison d'être*. Through its genealogical analysis, this thesis exposes the conditions of possibility and the subjectifying effects of such liberal internationalism.

### *Cosmopolitan Democracy as Politics/Ethics: A 'Statist-Legal' Cosmopolitan Government*

Part II of the thesis offers an embedded critique of Jürgen Habermas's cosmopolitan democratic vision of Europe – what I term a 'statist-legal' cosmopolitan government – and, by extension, speaks to a range of normative literatures in international political theory and European studies that find their inspiration in his thought. A cosmopolitan

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<sup>54</sup> Giandomenico Majone, *Regulating Europe* (New York: Routledge, 1996). For a critique, see Daniel Wincott, "European Political Development, Regulatory Governance, and the European Social Model: The Challenge of Substantive Legitimacy," *European Law Journal* 12 (2006).

<sup>55</sup> Kant, "Perpetual Peace: A Philosophical Sketch."

democracy scholarship is concerned, *inter alia*, that market-driven processes of globalisation are not managed in sufficiently democratic fashion by extant global governance institutions.<sup>56</sup> Unlike certain liberal internationalist perspectives, they are reluctant to invoke the state as the domain in which democratic legitimacy might be restored. They recognise that extant conditions of interdependence have generated material inequalities across states and that these render the possibility of individual and collective self-determination impossible in the absence of more robust post-national and global institutional arrangements. Such positions can be crudely understood as seeking to reinvent social democracy in conditions of globalisation.

In mainstream European studies scholarship, a 'statist-legal' cosmopolitan rationality of the sort that I associate with Habermas, often underpins complaints of democratic and social deficit; the view that a 'negative' integration has not been sufficiently offset by a 'positive' integration or that an 'output' legitimacy has continuously trumped an 'input' legitimacy.<sup>57</sup> Such a rationality is, as noted above, not merely an oppositional voice, but also very much present in cosmopolitan government in Europe. For instance, drawing on Habermas, within the field of European Studies, scholars such as Erik O Eriksen and his ARENA group have sought, via an analysis of immanent practices in the EU, to conceptualise in greater detail the limits and possibilities of a more democratic European

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<sup>56</sup> See, for example, David Held, *Democracy and the Global Order : From the Modern State to Cosmopolitan Governance* (Stanford: Stanford Univ. Press: 2000), David Held and Daniele Archibugi, *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity, 1995), James Bohman, *Democracy across Borders : From Demos to Demoi*, Studies in Contemporary German Social Thought (Cambridge, Mass.: MIT Press, 2007).

<sup>57</sup> Fritz W. Scharpf, "Negative and Positive Integration in the Political Economy of European Welfare States," in *Governance in the European Union*, ed. Gary Marks et al. (London: Sage, 1996).

polity. Others have, in various ways, sought to consider the democratic limits and possibilities inherent in post-national government in Europe.<sup>58</sup>

The Foucauldian methodology adopted in this thesis encourages a practical exploration of this 'statist-legal' cosmopolitan rationality and, as noted above, such an exploration is conducted with reference, in particular, to French discourses on/of EU(rope). Through such an exploration, the conditions of possibility of a cosmopolitan democracy are rendered explicit. In particular, to the extent that such scholarship and practice reinvents the features of nation-state – as the term 'statist-legal' cosmopolitan suggests – it also reinvents the ethical problems of nation-state that the EU and antecedents are so frequently celebrated as overcoming. In particular, it lends itself to an assimilatory agenda in its production of (neo)-republican European citizens and this can easily become a violently exclusionary politics.

#### *Radical Pluralism as Politics/ Ethics: A 'Deliberative-Legal' Cosmopolitan Government*

A turn to radical pluralism – and a 'deliberative-legal' cosmopolitan rationality of government - often involves a recognition of the aforementioned ethical problems associated with a cosmopolitan democracy. While these two perspectives share similar ontological assumptions and political goals, they emphasise and pursue their goals in quite different ways. In contrast to the statist approach, deliberative perspectives balk at

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<sup>58</sup> See for example, Erik O. Eriksen, *The Unfinished Democratization of Europe* (Oxford: Oxford University Press, 2009). On the 'normative turn' in EU studies, see Andreas Follesdal, "Normative Political Theory and the European Union," in *Handbook of European Union Politics* ed. Mark A Pollack and Ben Rosamond (London; Thousand Oaks Calif.: Sage, 2007).

the attempt to impose a substantive constitutional settlement or re-assert a methodological nationalism in post-national politics. They conceive of cosmopolitanism as, above all, inherently pluralist or difference-respecting and this translates into the imaginary of a multi-perspectival governance, which seeks to engage affected parties through civil society in an ongoing deliberative politics.<sup>59</sup>

Extending the logic of a Habermasian discourse ethic - much further than Habermas does himself in relation to his work on Europe – scholars such as Bohman promote a deliberative politics which, in concrete terms, requires the ongoing engagement of civil society in political decision making and implementation. The law, from this perspective, is more reflexive law than constitutional and, spatially and cognitively, decision making does not rely so heavily on the conception of community. As the thesis discusses in detail in Part III, such a deliberative rationality is often presented – in scholarly and EU institutional discourses - as a response to the totalities of market and state which are ever-present in, respectively, ‘market’ and ‘statist-legal’ cosmopolitan government. It can be understood, in other words, as a ‘third way’ whose inherent reflexivity and sensitivity to change and difference offers an answer to the potential extremes of both.

At one level, a radical pluralism might seem to *embody* the aforementioned Foucauldian ethos of critique. However, as highlighted above, this thesis will argue that in both theory and practice such rationalities always involve the imposition of a conditionality; they rely upon and promote a particular subjectivity. Indeed, it is shown that, to the

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59 See, for example, Bohman, *Democracy across Borders : From Demos to Demoi*.

extent that a cosmopolitan government in EU(rope) is originally constituted on the basis of a market cosmopolitan rationality, the response of a deliberative government is always restrained in its potential to move beyond this rationality and the subjects that it promotes (see above and Part III). Moreover, within a framework where both pluralism and an overarching economic constitution are promoted, governmental arrangements themselves become potentially subject to competition; it is a case of 'competitiveness all the way down'. There is a connection here with the influential concept of multi-level governance in European studies. While such a theory might seem to be ostensibly descriptive and politically neutral its implementation is certainly not, as certain of its proponents have intimated. Indeed, in the context of the promotion of 'competitiveness all the way down', extant instances of multi-level governance, such as the open-method of co-ordination (mentioned above and discussed in detail in Part III), may tend towards the marketisation of public good provision and advocate overlapping and competing jurisdictional forms.<sup>60</sup>

The foregoing discussion has highlighted the usefulness of an embedded Foucauldian critique of cosmopolitan international political theory as it is manifest in IR and European Studies. This Foucauldian critique contributes to this literature inasmuch as it highlights the contingent conditions of possibility and subjectifying effects of cosmopolitan thought as practice. It does not, it should be repeated, lead to the celebration of a particular

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<sup>60</sup> They may, then, tend towards what Marks and Hooghe have termed a 'Type II' multi-level governance. In particular, this type owes much to a public choice theory that is indebted to a broader US (Chicago school) neo-liberal tradition of the sort analysed in Foucault's genealogy of liberal government (and, indeed, throughout this thesis). See, Liesbet Hooghe and Gary Marks, "Unraveling the Central State, but How? Types of Multi-Level Governance," *American Political Science Review* 97, no. 2 (2003).

cosmopolitan rationality and is not rooted in a prior conception of truth. It seeks, rather, to unsettle the particular truths that these cosmopolitan agendas propagate; it seeks not to highlight that everything is bad, but that 'everything is dangerous'.<sup>61</sup>

### *Deploying another Foucault*

Of course, it could be reasonably contended that the Foucauldian methodology enunciated above offers little novelty in relation to a rapidly growing Foucauldian IR literature, or, for that matter, to a burgeoning Foucauldian European Studies literature. However, the thesis unites a set of themes and problematics in a manner that it is hoped will offer something distinct to such literatures.

A Foucauldian approach to EU(rope) has already been deployed by such scholars as Andrew Barry and, in book length, by William Walters and Jens Henrik Haahr. This thesis is indebted, in particular, to the invitation of the latter to think through Europe and European studies in terms of Foucault's thought and, in particular, his notion of governmentality. Following their work, the thesis seeks to explore the manner in which "dreams, rationalities, presuppositions" have become embedded in attempts to imagine and govern Europe.<sup>62</sup> Both their work and this thesis consider certain common theoretical and empirical themes – for example, liberal government, the common and single market (Part I) and the case of the Lisbon strategy and the associated OMC (Part

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<sup>61</sup> Foucault cited in Gordon, "Governmental Rationality: An Introduction." p.46.

<sup>62</sup> Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*.

III). Apparently reading Foucault's work on governmentality in terms of his earlier work on 'the disciplines' associated with *capillary power* and social institutions, Walters and Haahr are at pains to point out a multiplicity of knowledge/power nexuses at play in the EU, focusing on a fascinating range of problematics of government and various micro-power structures. In contrast, this thesis places centre stage one aspect of their analysis; that is, as highlighted above, the insight that liberal thought and government at the European level have been, to a large extent, co-constitutive in the modern European project. In that sense, it is interested in liberalism as a 'macro' rationality, a rationality that is prone to extension beyond the state, to a generalisation or *cosmopolitanisation*.

The turn to consider cosmopolitan government from a Foucauldian perspective might strike some scholars in this field as inconsistent with Foucault's own discourse and method, which for the most part eschewed 'grand theory'. However, the move is primarily inspired by Foucault's own abovementioned thought on biopolitics and liberal government, wherein he elaborates the necessity of considering the implications of broader knowledges and strategies of social organisation and their relationship with the micro-power - *the disciplines* focused on individual bodies - which he had elsewhere analysed.<sup>63</sup> Indeed, he is clear that there is a close relationship between the disciplining of individual bodies and the biopolitics associated with the 'social' body; "power takes control of life in both general and specific terms, of the human as living being and as part of a population".<sup>64</sup> The major contribution of this thesis to a Foucauldian European

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63 Michel Foucault, *Discipline and Punish : The Birth of the Prison* ([S.n.]: Vintage, 2009).

64 See, for instance, Stuart Elden, "Strategies for Waging Peace : Foucault as Collaborateur," in *Foucault on Politics, Security and War*, ed. Michael Dillon and Andrew W. Neal (London: Palgrave Macmillan, 2008). p.23.

studies literature is, then, to consider European government in terms of a broad and singular rationality that focuses on population.

Drawing the aforementioned distinction within Foucauldian IR scholarship in more general terms, Merlingen has suggested that,

[t]here is a curious bifurcation in Foucauldian interpretations of world politics. Governmentality studies stay close to Foucault's initial work on the topic. They offer insightful albeit (exceedingly) narrow empirical glimpses of decentred forms of governance that combine disciplinary tactics with strategies that shape the aspirations of the ruled and incorporate them into the projects of the rulers. Conversely, biopolitical readings of the international happily mix Foucault with other proponents of radical political theory. These readings produce highly innovative albeit (excessively) grand philosophical speculations about the conditions of contemporary human life—its subjection to a strategic calculus of utility, where the value to be promoted is variably described in terms of the resilience, operationality, and so on of liberal life.<sup>65</sup>

Whereas Walters and Haahr explicitly situate their work in the governmentality camp, as implied in the foregoing, I would tentatively situate this thesis in the latter, biopolitical camp to the extent that it engages an *overarching governmentality* of liberal cosmopolitan rule. That said, just as Walters and Haahr certainly do not neglect the biopolitical strategies that enframe particular practices, neither does the thesis neglect the particular practices that biopolitical strategies call forth; indeed, it is in an examination of practice that the tensions in such strategies are rendered explicit. Of course, from a Foucauldian perspective, whether one focuses on micro disciplinary governmentalities or large-scale biopolitical strategies is necessarily a matter of emphasis. Indeed, if any lesson is to be

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65 Michael Merlingen, "Monster Studies," *International Political Sociology* 2, no. 3 (2008): p.273.



drawn from Foucault's work in its entirety, it is that the two are inescapably connected and always mutually constitutive within complex networks of knowledge/power. In that sense, any attempt to draw too sharp a distinction between this thesis and Walters and Haahr's work would be a case of the narcissism of small difference. Indeed, both seek to marry the micro and macro in the manner spelled out by Merlingen, who argues that,

If the philosophical and empirical are brought together—by scaling up governmentality studies to incorporate conceptions of the social whole and by scaling down biopolitical studies to give them stronger empirical content—then we have the beginnings of a powerful critical sociology that pulls the analysis of subjectivity into the exploration of world order.<sup>6659</sup>

This thesis, will, it is hoped, contribute to such a critical sociology. Cosmopolitan theory is the conceptual hook via which a governmentality studies of the sort that I would associate with Walters and Haahr is 'scaled up' and the case of European integration is the 'empirical content' via which any pretensions to 'excessively grand philosophical speculations' are resisted. In other words, it is hoped that something more general can be said about the subjectivities of (cosmopolitan) government in Europe than Walters and Haahr attempt, while the inherent difficulty of the case itself repeatedly restrains any impulse to make excessively sweeping generalisations.

More generally, then, the thesis extends a 'governmentality' analysis (in the narrow sense, drawn from his lecture series, *Security Territory, Population*) in IR<sup>67</sup>, by drawing on

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<sup>66</sup> Ibid.

<sup>67</sup> See, for instance, Merlingen, "Foucault and World Politics: Promises and Challenges of Extending Governmentality Theory to the European and Beyond." Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*, Ole Jacob Sending and Iver B. Neumann, "Governance to

Foucault's more recently published lecture series, *The Birth of Biopolitics* (1978-9)<sup>68</sup>, which focused on the emergence of a liberal government informed by political economy (see above). I would concur with Donzelot who notes of these lectures that, "what quickly struck me was the astonishing topicality of this analysis of liberalism more than a quarter of a century after it was formulated."<sup>69</sup> This topicality applies not only to liberalism within nation-states, but also to a 'global' liberal politics more generally. To date though, these lectures have, for the most part, only been mentioned in passing in Foucauldian IR scholarship.<sup>70</sup> Indeed, such scholarship, while it has made certain claims regarding the nature of liberal war and security – sometimes called a *global biopolitics*<sup>71</sup> – it has tended to underplay the distinctly *economic* forms of life that such a biopolitics aims at securing. This is to agree with Kiersey that Foucault, "...had a somewhat more nuanced understanding of the basis of liberalism's need for security than many analysts of biopolitics let on.... [L]iberal governmentality is staked upon a strategic imperative to arrange a margin of freedom not simply for life but *for life understood as economic behavior*." More strongly, "[p]olitical economy is *the* language of liberal security."<sup>72</sup> Closely reading Foucault's most recently published lectures, this thesis largely follows Kiersey's line of

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Governmentality: Analyzing NGOs, States, and Power," *International Studies Quarterly* 50, no. 3 (2006).  
 Amoore, "Foucault against the Grain." Diez, "Michel Foucault and the Problematization of European Governance."

68 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*.

69 Jacques Donzelot, "Michel Foucault and Liberal Intelligence," *Economy and Society* 37, no. 1 (2008). p.116.

70 Notable exception from outside IR include, Thomas Lemke, "The Birth of Bio-Politics: Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality," *Economy and Society* 30, no. 2 (2001).

Donzelot, "Michel Foucault and Liberal Intelligence."

71 Michael Dillon and Andrew W. Neal, *Foucault on Politics, Security and War* (London: Palgrave Macmillan, 2008). Michael Dillon and Julian Reid, *The Liberal Way of War : Killing to Make Life Live* (London; New York: Routledge, 2009), Julian Reid, "Life Struggles: War, Discipline and Biopolitics in the Thought of Michel Foucault," in *Foucault on Politics, Security and War*, ed. Michael Dillon and Andrew W. Neal (London: Palgrave Macmillan, 2008).

72 Nicholas Kiersey, "Scale, Security, and Political Economy: Debating the Biopolitics of the Global War on Terror," *New Political Science* 31 (2009).

thought in Part I, seeking to emphasise the ways in which the promotion of particular economic subjectivities or “subjects of right” – contemporaneously, *entrepreneurial* subjectivities – has been central to the securing of a liberal mode of government and to the constitution of post-national government in EU(rope).<sup>73</sup>

However, as intimated in the above, this thesis departs from Kiersey in recognising, along with Foucault, the continued relevance of a juridical-sovereign mode of thought – a legal cosmopolitan government - which might also be characterised as liberal. In this sense, political economy might be regarded as the *most important* language of liberal security, but law – rooted in the imaginary of social contract - is another. This is reflected, of course, in the aforementioned tension between a ‘subject of interest’ and ‘subject of right’. Indeed, Foucault is clear in these lectures that a border-transcending liberal governmentality does not entirely displace a concern with sovereignty, borders and territory, even as it to some extent reframes such governmental concerns in biopolitical terms; government is enjoined to think in terms of population, demography and a social *body*. From a Foucauldian perspective, and as suggested above, it would, therefore, appear to be every bit as important to expose to critical scrutiny these juridical – ostensibly ethical - rationalities of European government that in the context of the politics of EU(rope) have tended to occupy a position of resistance.

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73 To the extent that the thesis focuses on an analysis of the market and entrepreneur as governing rationality (particularly in Chapter 6), it speak to and contributes towards a burgeoning *post-structural* - particularly a ‘cultural’ and Foucauldian literature - in IPE, interested in considering the concrete emergence of a range of economic subjectivities. Such literature is itself closely connected to the critical international political theory described above. See, for instance, Marieke de Goede, ed., *International Political Economy and Poststructural Politics* (New York: Palgrave Macmillan, 2006). ———, *Virtue, Fortune and Faith : A Genealogy of Finance* (Minneapolis, Minn.: University of Minnesota Press, 2005). Paul Langley, *The Everyday Life of Global Finance Saving and Borrowing in Anglo-America* (Oxford: Oxford University Press, 2008). Jacqueline Best and Matthew Paterson, eds., *Cultural Political Economy* (London; New York: Routledge, 2010).

In so doing I draw in particular on an earlier of Foucault's recently published lecture series, *"Society Must Be Defended"*<sup>74</sup>, which offers, *inter alia*, a thought provoking critique of a juridical form of political theorising through a historicist rendering of a discourse of 'politics as the continuation of war by other means'. Again, I am certainly not the first to explore the utility of these lectures for thinking through the limits of the juridical-liberal state and questions of security and war.<sup>75</sup> However, there is perhaps a certain novelty in the attempt to juxtapose these aspects of Foucault's thought with his considerations of government as liberal political economy. Indeed, via Foucault, we come full circle here to the general claim that the thesis contributes to a critical interrogation of the relationship between a market and legal cosmopolitan rationality of government. As highlighted above, the attempt to think through the difficult relationship between a *"subject of interest"* and *'subject of right'* in the context of European politics is the major contribution of this thesis and one that is indebted, above all, to a set of Foucauldian voices that have not, to date, been brought into dialogue.

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74 Foucault, *"Society Must Be Defended" Lectures at the Collège De France, 1975-76*.

75 See, for example, Elden, "Strategies for Waging Peace : Foucault as Collaborateur.", Andrew W. Neal, "Goodbye War on Terror? Foucault and Butler on Discourses of Law, War and Exceptionalism," in *Foucault on Politics, Security and War*, ed. Michael Dillon and Andrew W. Neal (London: Palgrave Macmillan, 2008), Mariana Valverde, "Law Versus History: Foucault's Genealogy of Modern Sovereignty," in *Foucault on Politics, Security and War*, ed. Michael Dillon and Andrew W. Neal (London: Palgrave Macmillan, 2008).

## Foreshadowing Conclusions: Foucauldian Methodology as Ethics

In summary then, it can be said that a Foucauldian methodology, coupled with the deployment of the *particular Foucault* described above, permits a problematisation of a variety of theoretical assumptions about cosmopolitan government in general and cosmopolitan government in Europe in particular. And yet, as Foucault makes clear, it is a method which should be circumspect in terms of its own potential; it should be careful about overstating the importance of the present that it critiques. Foucault enjoins us to “not allow ourselves the facile, rather theatrical declaration that this moment in which we exist is one of total perdition, in the abyss of darkness, or a triumphant daybreak, etc. It is a time like any other, or rather, a time which is never quite like any other.”<sup>76</sup> This invocation of the importance of an intellectual modesty seems particularly critical at a time when liberal government – so recently celebrated as triumphant, at the pinnacle of the ‘end of history’ – is now so frequently conceived as in ‘crisis’ in popular discourse.

Such modesty is reflected in an acknowledgement of all the aforementioned ambiguities inherent in cosmopolitan government itself. It is also apparent in a recognition of the embeddedness of this thesis in a particular and contingent temporal landscape; in other words, an acknowledgement of the inevitable politicisation involved in the genealogical endeavour itself. Perhaps the central political claim within the thesis is its assertion that *the market* has been the foremost contingent historical condition of possibility for

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<sup>76</sup> Cited in: Colin Gordon, “Question, Ethos, Event: Foucault on Kant and Enlightenment,” *Economy and Society* 15, no. 1 (1986). p.82.

cosmopolitan government in Europe. Concurring with Foucault's assertion that political economy has emerged as the dominant knowledge of liberal government, the market is the point of departure and arrival for this thesis, which claims that such a discourse enframes all cosmopolitan discourse in the present and is, indeed, the most powerful discourse in governing and constraining subjects in our present (see, in particular, Chapters 1 and 6). While examples are drawn upon throughout in support of such an assertion, any statement on the prevalence of the market is itself a reflection of the current times – briefly mentioned at the beginning of this Introduction - and my own position within them; it reflects my sense that contemporaneously a neo-liberal rationality and associated subjectivities have been discursively privileged in a manner that has delimited the possibilities of *being otherwise* (see Chapter 6 and Conclusion). It reflects a *political* attempt to enjoin those who support or promote a cosmopolitan government to acknowledge and reflect upon the role of the market as that which might delimit the possibilities of their thought/practice. This acknowledgment of an ethico-political orientation would seem unsatisfactory from the perspective of an ostensibly rigorous social science, but the genealogical method involves the recognition that such a bind is simply inevitable and even unavoidable.<sup>77</sup>

Of course, such a position does not involve the privileging of an alternative transcendent subjectivity or ontology in the manner of many contemporary critiques of capitalism. All such ontologies are the object of critique as reflected in the discussions of legal

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<sup>77</sup> See Hutchings for similar reflections, which seek to combine a Hegelian phenomenology with a Foucauldian genealogical approach. Hutchings, *International Political Theory: Rethinking Ethics in a Global Era*. pp.114-7. See also Elbe, "'We Good Europeans...': Genealogical Reflections on the Idea of Europe." pp.262-3.

cosmopolitan rationalities of government in Parts II and III. A Foucauldian methodology prompts an ongoing reflexive ontological debate and this does not rely on the adoption of an opposing truth or allegiance to a tradition or group that supports such a truth. As Foucault says,

I do not appeal to any 'we' – to any of those 'we's' whose consensus, whose values, whose traditions constitute the framework for a thought and define the conditions in which it can be validated. But the problem is, precisely, to decide if it is actually suitable to place oneself within a 'we' in order to assert the principles one recognizes and the values one accepts; or if it is not rather, necessary to make the future formation of a 'we' possible, by elaborating the question.<sup>78</sup>

It is, as alluded to above, this 'elaboration of the question' – a problematisation of a given 'we', truth or identity manifest in forms of cosmopolitan government - which informs the approach to ethics adopted in this thesis. As noted above, this is not apolitical – there are *principles* and *values* underpinning the endeavour – but there is a refusal to associate a political sensibility with a *transcendent* 'we'; the emphasis is, rather, on pointing to the limits of *any* 'we' and associated truths. At the same time, the thesis is not insensitive to the intensely political nature of ethics and the *contingent, strategic necessity* to align with a 'we' at particular moments. The recognition of the very performativity – and potential violence - of such identifications prompts, though, a certain ironic sensibility towards the prevailing order, but this should not be confused with a nihilistic disinterest as many of Foucault's critics have claimed (see Conclusion for further discussion).<sup>79</sup> On the contrary,

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<sup>78</sup> Michel Foucault, "Polemics, Politics and Problematizations: An Interview with Michel Foucault," in *The Foucault Reader*, ed. Paul Rabinow (London: Penguin Books, 1984).p.385.

<sup>79</sup> See, inter alia, Nancy Fraser, "Michel Foucault: A 'Young Conservative'?", in *Michel Foucault: Critical Assessments, Vol.3*, ed. Barry Smart (London: Routledge, 1994), Charles Taylor, "Foucault on Freedom and Truth," in *Foucault: A Critical Reader*, ed. David Couzens Hoy (Oxford: Blackwell, 1994), Michael Walzer, "The

it is a sensibility which fuels a constant activism that can orient in ostensibly opposite directions at different junctures in time-space. It is a sensibility which guards, then, against a comfortable complacency, even regarding one's own identity. As Foucault once said, "do not ask me who I am and do not ask me to remain the same".<sup>80</sup>

Relating such reflections to the central thesis, I would argue that the ambiguity in the relationship between 'subject of interest' and 'subject of right' that I identify in cosmopolitan government in Europe may be something worth holding on to, rather than something that such government seeks to expunge through the privileging of one or the other or an attempted reconciliation of the irreconcilable. As discussed in greater detail in Conclusion, this should not mean the absence of political activity, decision or judgement; rather it gives renewed urgency to such judgement, which is no longer situated within the comfort of a universal principle. In relation to Europe, this is to promote a pragmatic politics in/ for Europe; a politics that resists practical and scholarly efforts to understand and explain it in terms of the easily digestible, but highly problematic, imaginaries of market and state. In this sense, a post-disciplinary approach to EU(rope) of the sort adopted in this thesis is ethically and practically important to the extent that it problematises the performative implications of a mainstream analytical political science and IR scholarship which tends towards the totalisation of particular imaginaries and identities. Instead, inspired by a Foucauldian methodology, it encourages a more uncertain or insecure rendering of EU(rope) that offers the space for a

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Politics of Michel Foucault," in *Foucault a Critical Reader*, ed. David Couzens Hoy (Oxford: Blackwell, 1994), Jürgen Habermas, "Some Questions Concerning the Theory of Power," in *Michel Foucault: Critical Assessments, Vol.5*, ed. Barry Smart (London: Routledge, 1995).

80 Michel Foucault, *Archeology of Knowledge*, Routledge Classics (London: Routledge, 2007 (1972)). p.19.



more variegated picture of what Europe and the European subject could/ might/ should be. Europe (and European government), thus rendered, becomes an inherently unstable ethical space where change and contingency are not to be constantly overcome or thwarted, but acknowledged and accepted.<sup>81</sup>

## Chapter outline

### *Part I: A Genealogy Of Liberal Government In Europe: Towards A Market Cosmopolitan Order?*

As elaborated above, the archive to which this thesis refers is, in accordance with a Foucauldian approach, both incomplete and extremely broad in its scope. This, it might be thought, would make for a disorganised thesis, but there is a uniting theme, which I discern not primarily from Foucault's method, but from one of his lesser-known analyses. As elaborated in Chapter 1, Foucault's genealogy of what is called for shorthand 'liberal government' sets out – like his genealogies of madness and sexuality – to describe and analyse a shifting 'regime of veridiction' or *ethics*, which, according to his account, emerged in the eighteenth century and was of enduring importance at the time of his lectures in the late 1970s and, I would contend, continues to be of importance today. Drawing on this analysis, Chapter 1 extrapolates the market and legal cosmopolitan rationalities of government discussed above. In particular, it highlights that the market

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<sup>81</sup> For more detail on this argument, see Conclusion.

came to occupy a central location in both the *constitution* and *rationale* of contemporary liberal government and represents a challenge to a legal (or *sovereign*) rationality rooted in social contract, which, nevertheless, is never entirely displaced. While the analysis refers to the importance of both the market and legal rationalities identified in introduction, it is argued - in accord with Foucault - that it was the former which gained in prominence from the eighteenth century and the latter which became primarily a rationality of resistance. This is reflected contemporaneously in the emergence of a German and, later, American, neo-liberal rationality of government, which is prevalent in contemporary post-national government, including at the European level.

Indeed, as discussed in Chapter 2, it is a market rationality which was central to the post-war constitution of European integration. Throughout this chapter, I trace the influence of various market liberal rationalities as they manifest in the cosmopolitan setting of contemporary European level government. In particular, this chapter highlights the constitutive importance of the German neo-liberal (or *ordo-liberal*) governmentality introduced in Chapter 1. It is the *ordo-liberal reversal* in the relative importance of market and state - as compared to classical liberal political economy - that makes it conducive to the founding of a post-national governmental apparatus such as the European Economic Community (EEC). Extending on an *ordo-liberal* logic, it is argued that an American neo-liberal rationality has come to dictate many aspects of cosmopolitan government in contemporary Europe. However, at the end of Part I, I elucidate extant resistance to this trend. In particular, I highlight the presence of the legal cosmopolitan rationalities traced in Chapter 1 in many aspects of contemporary European level government.

Throughout both chapters it is shown that a liberal market rationality, while rhetorically emphasising the importance of limited government, in fact relies on a substantive biopolitical apparatus. Indeed, while the market is a test of government which ought to establish its limits, market subjects must behave in certain ways – they must be governed - and there is consequently significant practical disagreement on exactly where such limits ought to lie. It is in this space of disagreement that legal cosmopolitan rationalities are able to (re)-assert themselves and resist the predominance of a market cosmopolitan rationality. In Part I such resistance is only briefly discussed in theory and practice by way of foreshadowing the more detailed discussions of legal cosmopolitan government and its ambiguities in the contemporary context of European post-national government in Parts II and III. Part I serves to demonstrate that, while of central importance, the extension of liberal-market rationalities into the on-going constitution and practice of European government is not complete; its power/knowledge leaves a space for resistance in which legal cosmopolitan rationalities can be asserted. Thus, it is shown that while they are cognitively separate, a market and legal cosmopolitan government in Europe “are superimposed, they cross, impose their own limits, sometimes cancel one another out, sometimes reinforce one another.”<sup>82</sup> This complex relationship is explored in greater detail in Parts II and III, via an exploration of the limits and possibilities of a legal cosmopolitan resistance in the face of a market cosmopolitan rationality.

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82 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*.

## *Part II: Legal Cosmopolitan Government I: The Ethics of a European Cosmopolitanism*

In Part II I turn to consider the theory and practice of a legal cosmopolitan rationality of government in the context of contemporary European level government. In particular, I turn to Habermas's work on Europe in order to elucidate the possibilities and limits of such a government. In Chapter 3, it is argued that Habermas proposes a European cosmopolitanism rooted in a 'constitutional patriotism' which re-creates many features of nation-state in post-national context – hence the label 'statist-legal' - in order to mitigate the extremes of a 'market' or neo-liberal Europe. It is for this reason that I look to the policy of a particular nation-state towards European level government (particularly the EU) in order to illustrate this Habermasian legal cosmopolitan rationality. Given France's frequent opposition to neo-liberal EU and its promotion of substantive republican values, it is the politics and policy of this country that is taken as an exemplar of Habermas's promotion of a European constitutional patriotism. Both Habermas and French policy promote a 'social' Europe rooted in a *political* constitution at European level in order to offset prevalent economic constitution (rejected by the French in 2005). From the perspective of a Habermasian governmentality, an inclusive and participatory process (rooted in his 'discourse ethic') that is *constitutionally guaranteed* by a *European demos* will precipitate a more redistributive policy at the European level.

While a legal cosmopolitan government challenges the undemocratic and egoistic tendencies inherent in a market cosmopolitan mode of government, in Chapter 4 it is argued that such a governmentality is not without its own ethical closures and potential

violences. Indeed, both Habermas himself and French policy come close to asserting a distinctly European community (on the model of nation-state) to the detriment of a host of different 'others' that must either be assimilated or excluded. More specifically, such a governmentality relies upon a republican subjectivity that is substantively drawn and more delimiting than is usually accepted or admitted by its advocates. This, it is argued, is reflected *inter alia*, in Habermas's (borderline chauvinistic) celebration of a 'core Europe', in France's promotion of an exclusive immigration policy at the European level, the unfavourable invocation in French public debate of the 'Polish plumber' and French opposition towards Turkey's EU membership. The key point to grasp from this Part of the thesis is that this ostensibly *ethical* governmentality, in opposing a market rationality itself requires that - to draw on the title of one of Foucault's lecture series - 'society must be defended' in a host of potentially violent ways.

### *Part III: Legal Cosmopolitan Government II: The Ethics of a Cosmopolitan Europe*

Perhaps as a response to the abovementioned limitations of a Habermasian governmentality, other legal cosmopolitan scholars are reluctant to define a *demos* and associated substantive identity, despite the fact that, in many cases, they are sensitive to the ethical limitations of a prevalent market rationality of government. Instead, they promote a cosmopolitanism that is radically open to difference; radically pluralist. Rather than an oxymoronic *European* cosmopolitanism they thus propose a *cosmopolitan* Europe. Governmentally, this means participation and deliberation, but not the imposition of a substantive constitution; not the spatial or cognitive delimiting of deliberation from the outset that Habermas could be accused of in relation to his politics

on Europe. Indeed, those adopting what I call a 'deliberative-legal' cosmopolitan rationality arguably apply a Habermasian discourse ethic in a far more thorough and consistent manner than Habermas himself. Part III of the thesis seeks to assess this deliberative governmentality in the context of European level government; in particular, it seeks to assess the extent to which it offers a way out of the governmental limitations associated with 'subject of interest' and 'subject of right' elucidated respectively in the previous parts of the thesis.

Chapter 5 discusses how this deliberative governmentality is manifest in the efforts of the European Commission to promote the concept of 'governance'. With reference to the work of a European Commission think-tank – the now disbanded Forward Studies Unit (FSU) – on the theme of governance, it is shown that the Commission has increasingly conceived of government in deliberative and participatory terms, rather than as a top-down hierarchical form of rule. Thereafter, the chapter shows how the Commission has sought to promote this governmentality, via its White Paper on Governance (2001) and thereafter its efforts to promote good practice, *inter alia*, in consultation with interested parties and transparency. The Chapter concludes by highlighting that the Commission's practical agenda falls short of the ideals expressed by the Forward Studies Unit. Indeed, the Commission continues to advocate the 'community method' which arguably precludes from the emergence of a truly deliberative form of government. It is noted that many deliberative scholars have, consequently, highlighted the OMC – an emergent form of 'soft' governance in the EU – as a closer immanent approximation of the deliberative ideal.

Chapter 6 critically assesses the deliberative possibilities of this mode of governance in practice and thereafter the potential limitations of a deliberative governmentality in general. It is argued that despite its ostensible 'openness', the method is, in practice, delimited by the economic constitution discussed in Part I. Indeed, the method emerges in the context of the Lisbon agenda, whose primary purpose is the championing of a competitiveness rationality for EU(rope). More generally, it is argued that any deliberative or open method of governance will, inevitably, require for its functioning a relation of power or government. It is, for instance, always necessary at some level to decide the best practice associated with an open regime of governance or decide the 'ground rules' within which participants deliberate on a particular issue. Correspondingly, civil society – a privileged domain in a deliberative rationality – is not divorced from power, as discussed with reference to contemporary government in the EU. Thus, a deliberative governmentality, to the extent that it is radically inclusive and respectful of difference, may be insufficiently robust in the face of a prevalent market cosmopolitan rationality at the European level. Indeed, it is argued that in practice, a deliberative governmentality has done little to offset this dominant rationality. This is something that Habermas seems to recognise and, indeed, is probably the reason behind his *much more political* assertion of a substantive constitution in/for Europe. The conclusion to Chapter 6 and, indeed, to the thesis, seeks to think through once again the difficult relationship between the '*subject of right*' and "*subject of interest*" and consider the lessons that can be taken from the foregoing analysis of their pervasive presence in the theory and practice of cosmopolitan government in Europe. Such reflection leads to the conclusion that a cosmopolitan government might be *more ethically* thought in terms of its

inherent ambiguity rather than a perpetual desire for a resolution and certainty which always carries within it the tendency towards violent totality.



**PART I:**

**A GENEALOGY OF LIBERAL GOVERNMENT IN EUROPE:**

**TOWARDS A MARKET COSMOPOLITAN ORDER?**

The forms and the specific situations of the government of men by one another in a given society are multiple; they are superimposed, they cross, impose their own limits, sometimes cancel one another out, sometimes reinforce one another.

*Michel Foucault*<sup>1</sup>

The basic law of the European Economic Community is liberal. Its guiding principle is to establish undistorted competition in an undivided market. Where rules are necessary to achieve this, they are rules to make freedom possible. For – to adopt a quotation from Kant – even freedom is ‘not the natural condition of man’.

*Walter Hallstein*<sup>2</sup>

This part of the thesis conducts a genealogy of cosmopolitan government. It does so with reference first to the constitutive importance of liberal government in Europe in the eighteenth century and thereafter with reference to the project of European integration since the Second World War. Exploring the origins of a cosmopolitan government in Europe, it sets out to demonstrate that a supranational government was constituted by a particular set of rationalities. In particular, the emergence of a liberal political economy in the eighteenth century which understands the market as a naturally functioning organic domain which denotes the limits of government is explored via a synthesis of

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1 Ibid. p.43.

2 W Hallstein, *Europe in the Making* (London: George Allen and Unwin, 1972), 29.

Foucault's genealogy. Biopolitics – the pursuit of the flourishing life of the *population* – becomes intimately connected with the preservation and promotion of the market as ontological reality. In contrast to a disciplinary politics associated with a regime of policing individuals, it enjoins government to allow a space of freedom in which (civil) society might fully flourish. That said, such freedom is in practice a conditional freedom; a freedom that is always necessarily *secured*. Market subjects do not always act in accordance with their nature; there is, indeed, a curious paradox in the fact that markets along with the subjects inhabiting them must be *made*. As highlighted in Chapter 1, it is in such a context that a disciplinary politics is put to the work of a liberal government from the eighteenth century onwards.

The logic of this market government is necessarily not restricted to the borders of the state; indeed, it precipitated the concept of trade and ever freer trade. Eventually, it has even come to challenge the very notion of a *delimitation of population within the state* and, indeed, the very institution of state. While, from the point of view of national governments, free trade might initially have been that which was good for the welfare of national populations, it gradually became that which might be good for broader conceptions of population and, indeed, *humanity* more generally. There is, then a cosmopolitan extension of market liberal thought in both theory and practice. This was to a large extent constitutive of cosmopolitan government in practice and, in particular, the early European integration project, as discussed in some detail in Chapter 2. In particular, following Foucault's analysis, it is argued that the German neo-liberal (or ordo-liberal) reversal of state and market – whereby the state is increasingly governed by the logic of the market - is particularly conducive to the founding of a European

Economic Community. In the context of what Foucault calls an American neo-liberalism – in particular associated with the Chicago school – the logic of market is extended increasingly into non-economic domains within the governmental apparatus at the European level. Such analysis reveals, then, that a European level government ought not to be taken for granted, but rather considered as the contingent privileging of a particular set of knowledges associated with political economy and liberal government. Indeed, market knowledges became central to the biopolitical endeavour of promoting life of/for populations, to the point where the link between populations and state even came to be blurred such that biopolitics itself became increasingly *cosmopolitanised*. Considering the possibilities of a market cosmopolitan government, it could be said that such knowledges constituted and continue to constitute the European level of government and thereby, to a large extent, succeeded in the pacification of warring nationalisms in Europe.

However, as reflected throughout Part I, a market cosmopolitan rationality has never entirely displaced governmental rationalities associated in Foucault's account with the law and *raison d'état*. Indeed, following Kant, many liberal and cosmopolitan perspectives consider that the promotion and extension of market alone is not conducive to the biopolitical maximisation of performance, welfare or security. Thus, a legal cosmopolitan government remains present within European level government as the promise of a 'social' Europe, a European constitution and as the promotion of European citizens. Such an imaginary of government is considered more fully in Parts II and III.

# Chapter 1: A Genealogy of Liberal Government in Europe I: Conceiving a European Economic Unit

## Introduction

This chapter sets out to describe and build upon Foucault's genealogy of liberal government and consider its implications for our understanding of *cosmopolitan* government in Europe. It is organised in terms of the two discourses identified as the central characteristics or ethics of contemporary liberal government in Europe: a *market* and a *legal* cosmopolitan rationality. Drawing largely on Foucault's historical analyses, this chapter seeks to offer a preliminary analysis of the connections and tensions between these rationalities of liberal government as they emerge *in* European government; it constitutes an exposition of the ways in which these discourses or rationalities of government overlap and reinforce one another in their common liberal heritage. At the same time, in thinking liberal government in terms of these discourses, the chapter anticipates some of the contradictions and tensions that lay at the heart of cosmopolitan government in general and which I elaborate in later chapters with reference to the EU and its antecedents. This chapter also presages the ways in which these same governing rationalities have, as well as constituting *the purpose* of European government, been continuously *constitutive of* this scalar or geographical entity called Europe. My interpretation of Foucault's genealogy of liberal government serves, then, as a useful way of illuminating the conditions of possibility of contemporary cosmopolitan thought and

practice discussed later in the thesis. In particular, through its episodical evocation of the importance of Kant, classical liberal political economy and, more recently, neo-liberalism in its German and US varieties, it establishes the conditions of possibility of an array of contemporary political cosmopolitan theories and practices highlighted in Introduction and invoked throughout.

The chapter proceeds in three main sections. The first traces the emergence of a liberal governmentality and notes the importance of political economy and the market as a domain which delimits and restrains government, highlighting the way in which liberal rationalities impose themselves in the face of a prevailing *raison d'état*. Theoretically, if not practically, the governing knowledges associated with a liberal political economy make possible the visualisation of *European* and even *global* spaces as economic units. Related to this, liberal government is interpreted as an ethical good to the extent that the commercial freedoms it affords facilitate peaceful relations both within and between states; market society and civil society are co-constitutive and it is possible to speak of a market cosmopolitan rationality. Indeed, it is made apparent that the liberal economic rationalities that are so frequently derided as unethical in a contemporary critical and post-Marxist political economy, were understood as fulfilling an important ethical function in a Kantian cosmopolitan thought and, as discussed in Chapter 2, in the cosmopolitan practice of European integration.

The second section focuses on what, in substantive terms, the insights of eighteenth century political economy imply for governmental practice beyond simply attempting to define its limits or no-go areas. It is argued that the very definition of the limits of

government is, in various ways, constitutive of positive practices of government or practices of *security* which are manifest in the combining of a disciplinary and regulatory politics, or what Foucault called a biopolitics. In other words, liberal government is not less government, but only different government. These governmental practices are discussed in three sub-sections, following Foucault's account: first in relation to classical eighteenth century liberalism, second in relation to a contemporary, reformulated German neo-liberalism and finally in relation to a US neo-liberalism. The latter sub-sections highlight, in particular, the reversal in the relative importance of market and state, with the former increasingly privileged and secured within neo-liberal modes of government. This reversal offers the liberal rationale for the substantive development of post-national government in general and in Europe in particular, although, as emphasised in Chapter 2, it certainly does not render such developments inevitable in practice.

The third section considers the tension in cosmopolitan thought between the market cosmopolitan rationalities and the rationalities associated with *raison d'état* or what I term legal cosmopolitan rationalities of government. This section demonstrates the resistance *from within cosmopolitan thought* to the market cosmopolitan rationalities that emerge with classical liberalism and develop into contemporary neo-liberalism. Legal rationalities of justice and democracy are thus treated not as universal or transcendent truth as in much recent international political theory, but as strategic political practices with their own genealogy rooted in the concept of sovereignty and imaginary of social contract. This chapter offers then a preliminary exploration of the theoretical relationship between a market and legal cosmopolitan rationality of government, alluding to the difficulties in

reconciling these governing imaginaries. Such difficulties are explored in far greater detail throughout Parts II and III, where they are vividly illustrated with reference to the politics of the contemporary EU.

## **Liberal Governmentality and Cosmopolitan Rationalities**

### *The Market and the Emergence of Liberal Government*

Emerging in eighteenth century Europe, a liberal mode of rule is conceived in extremely broad terms by Foucault and contrasted with the preceding mode of *raison d'état*. A liberal government imposes limits; it objects to excessive government rather than focusing on the abuse of sovereign power, which formed the oppositional framework for constraining the reality and, contemporaneously, the spectre, of police state. Of course, as noted in Introduction, the importance of sovereign power is not simply displaced by liberal rationalities of government. Rather there is an inter-mingling of sovereign and liberal practices and rationalities. The emphasis on a liberal government in the eighteenth century is closely associated with the emergence of political economy at this time. A central indicator of nature or truth, which was identified by political economy and to which governmentality is enjoined to respond, is the organising terrain of the market. The market as a field of activity for the population – itself, as noted in introduction, a relatively new concept - becomes useful in unveiling a set of natural laws or principles, which inform the art of government from the eighteenth century onwards. While it was a site of extensive jurisdiction in the Middle Ages and sixteenth and

seventeenth centuries, it becomes rendered as a natural domain in which government should only intervene in order to preserve those spontaneous competitive natural tendencies. In particular, the tendency of the market to produce a natural price which regulates the relationship between the cost of production and demand is regarded as particularly important and something to be respected by government. Thus, political economy, "pointed out to government where it had to go to find the principle of truth of its own governmental practice... [I]t is [the market's] role of veridiction that will command, dictate, and prescribe the jurisdictional mechanisms, or absence of such mechanisms."<sup>1</sup>

The role of the law thus changes in accordance with this shift to truth governed by the market. Under a regime of *raison d'état* the law involved primarily founding sovereignty and establishing the conditions of the sovereign's legitimacy and acted as an external constraint on the rationality of police. This form of public law, based on something like a social contract, continues to occupy a place within liberal governmentality and lives on, although, as explored below, it is frequently reconceived. The law is now tasked with demarcating the limits to the exercise of the public authorities' power; it is now intrinsic to government inasmuch as it is by observing governmental practice that the law that will limit government is enacted. Law is formulated after an assessment of the utility of governmental intervention in a given area and an assessment of the functioning of the market is central to this utilitarian endeavour. Thus there emerge "two *absolutely heterogeneous* conceptions of freedom, one based on the rights of man, and the other

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<sup>1</sup> Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.32.



starting from the independence of the governed.”<sup>2</sup> This is a crucial point in Foucault’s analysis which, it ought to be noted, will inform much of this thesis.

While the language of rights is today still deployed, it is in both senses that rights are claimed: sometimes as a juridical question of rights and at other times as a claim of independence from the government. These systems of law may coexist and prescribe similar things for government, but, as I will explore in this chapter, they remain disparate in terms of their origin and underlying logic. As Foucault says, “this ambiguity is a characteristic feature of ...nineteenth and twentieth century European liberalism”<sup>3</sup> and this might well be extended to cover twenty-first century Europe in general and the EU and its antecedents in particular. However, in this particular context, as in the eighteenth century to which Foucault refers, it is still possible to concur with his observation that, “[o]verwhelmingly ... regulation of the public authorities in terms of utility prevails over the axiomatic of sovereignty in terms of original rights.”<sup>4</sup> That is not to say that a logic or discourse of rights and sovereignty simply disappears, but it is now bound up with a form of government geared towards utilitarian calculations of various sorts, as I will discuss in greater detail below. It is certainly a contention of this thesis that a utilitarian rationality focused on the market as site of veridiction provides the primary (but not exclusive) logic explaining both the emergence and purpose of a European level of government.

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2 Ibid. p.42. my emphasis

3 Ibid.

4 Ibid. p.43.

Indeed, it was such a rationality that made something like the EU conceivable as a possibility in the first place. The shift to liberal government that Foucault describes is not only relevant to the internal management of the state, but has clear implications for international relations in general. The knowledge imparted by political economy in the eighteenth century was quite different to the mercantilist ideas that characterised *raison d'état*. Whereas the latter saw economic enrichment as a zero-sum game and the balance of power as a means of limiting the domination of any one state, liberalism sees economics in quite different terms. The wealth of one's neighbour is, from the eighteenth century, rendered important for one's own enrichment. As spelled out in the ideas of Smith and Ricardo, commerce is mutually beneficial for nations and so the market ought to be conceived in as broad terms as possible because the game of competition now ensures reciprocal enrichment. The *idea* of a Europe of collective enrichment thus emerges in this period and a developmental logic or logic of mutual progress becomes important throughout Europe. As Foucault says:

[T]his may be the first time that Europe appears as an economic unit, as an economic subject in the world, or considers the world as able to be and having to be its economic domain... Europe is now in a state of permanent and collective enrichment through its own competition.<sup>5</sup>

Of course, it is important to recognise that the concept of a European economic unit, while emerging in classical liberal theory, was not fully embraced by political actors of the time that these ideas were initially proposed. Some significant advances were made in freeing trade and commerce in the mid nineteenth century – often attributed to British

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<sup>5</sup> Ibid. p.55.

hegemony – and this period has been considered as ‘the first age of globalisation’.<sup>6</sup> However, free trade in this period was based on a series of bilateral intergovernmental agreements, which proved fragile when economic depression hit in the late nineteenth century. In the early twentieth century, while the idea of a federal Europe was mooted and these ideas often included the notion of Europe as economic unit, rationalities which highlighted economic interdependence and the pitfalls of beggar-thy-neighbour economics were ultimately not sufficiently embedded politically to challenge nationalist forms of sovereign government which, of course, played an important part in the wars of the first half of the twentieth century.

As I discuss below, these political contingencies mean that the classical liberals still conceive of the market as a site to be supervised by the state, conceding much to the juridical sovereign legitimising rationalities from which they emerge as distinctive. It is only with the emergence of neo-liberal thought and its increasing political saliency after the Second World War that the conceptualisation is reversed and the idea of a state under the supervision of the market becomes conceivable. In the modern European project, or more accurately, in the formation of a constitutionalised *common* or, later, *single* market, we perhaps see its culmination or at least a much fuller expression of these liberal rationalities, as I discuss in Chapter 2.

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<sup>66</sup> Robert Gilpin and Jean M. Gilpin, *The Political Economy of International Relations* (Princeton, N.J.: Princeton University Press, 1987). Free trade advocates in Britain, such as John Cobden, definitely saw free trade in terms of both its economic benefits and irenic effect, as reflected in the negotiation of the Cobden-Chevalier treaty in 1860.

Adam Smith proclaimed that, "[e]very man, as long as he does not violate the laws of justice, must be able to pursue his interest and bring his capital where he pleases."<sup>7</sup> This free capital movement and self-interested behaviour is not only to obey 'the laws of justice' as Smith puts it, it is also, at least in certain regards, thought to be constitutive of those very laws by a number of eighteenth century thinkers. As noted above, it requires a limited form of government that is thought by many to be just, certainly in comparison to the oppression of the police state. The government, like all economic actors, is, with the birth of classical liberal political economy, rendered ignorant of the totality of social and economic processes, which are 'invisible' to it and it therefore has no business in intervening extensively in the economy.<sup>8</sup> As Foucault notes, the sovereign – and any attempt at intervention in the market or economy - is to a large degree dethroned by the privileging of the 'subject of interest'. Political economy of the eighteenth century alerts us to the sovereign's limitations; it demonstrates the inability of any actor, including the sovereign, to master the totality of social and economic processes and warns against any conscious action for the collective good. In other words, the sovereign is "discharged of a duty, in the attempting to perform which he must always be exposed to innumerable delusions"<sup>9</sup>; indeed, "liberalism acquired its modern shape precisely with the formulation of the *essential incompatibility* between the non-totalizable multiplicity of economic

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7 Adam Smith, "An Inquiry into the Nature and Causes of the Wealth of Nations," (1776), <http://www.mdx.ac.uk/www/study/xsmith.htm>. (¶4.9.53) Accessed August 2010.

8 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*.

9 Ibid. p.281.

'subjects of interest' and the totalizing unity of the juridical sovereign"<sup>10</sup>. Hume's utilitarian conception of morality as an enterprise geared towards maximising the fulfilment of human desires is compatible with this notion of limited government and free commerce. In other words, civil society and a market society are considered to be compatible.

Furthermore, this emphasis on free commerce was thought to have implications for peace among nations, as spelled out by Kant who rooted the notion of perpetual peace in an immanent nature and saw in nature the spirit of commerce. As he states,

The spirit of commerce, *which is incompatible with war*, sooner or later gains the upper hand in every state. As the power of money is perhaps the most dependable of all the powers (means) included under the state power, states see themselves forced, without any moral urge, to promote honourable peace and by mediation to prevent war wherever it threatens to break out.<sup>11</sup>

Contemporaneously, the relationship between commerce and peace has been celebrated by such institutions as the free-market think-tank, the Cato Institute, which draws (albeit highly selectively) on eighteenth century thinkers such as Smith in order to support their claims:

Adam Smith had the great insight two centuries ago that self-interest, unfettered by bureaucratic guidance or constraints, served the common good better than state control. Market forces act as an "invisible hand," freeing the productive potential of human populations. Today, there is

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<sup>10</sup> Ibid. p.282.

<sup>11</sup> Kant, "Perpetual Peace: A Philosophical Sketch."

increasing evidence that an invisible hand also acts on the foreign policies of nations. Global markets offer an alternative to the revelatory mechanism of warfare, while prosperity makes some forms of aggression unprofitable. The search for world peace has long been consumed with the need for selflessness, though altruism appears to have achieved little pacific impact in practice. Instead, it is a by-product of self interest that has been found to yield yet another virtuous social effect. The flowering of economic freedom, what some have derisively labelled "greed," has begun to dampen the fires of war that to many seemed perennial and inherent, a product of civilization itself.<sup>12</sup>

The notion of the invisible hand is evoked here in order to note the virtuous effects of unfettered commerce or the pursuit of self-interest, not only within a given state, but also for relations between states. Certainly such an idea has been central to such concepts as a liberal-democratic peace thesis, which contends that liberal democracies, or in Kantian terminology, Republics, are less likely to go to war with one another.<sup>13</sup> The concept of the invisible hand, as noted, leads to a test of government based on an assessment of the market or the freedom of individuals to pursue their interests. Extending such a logic to the international or global therefore calls for limited government wherever it is to be found, above or below the state, at least to the extent that government prevents individuals from pursuing their self interest. We find the seeds of a certain cosmopolitan perspective in this logic. Indeed, Kant, often regarded as the father of a modern cosmopolitan thought, recognized the need to extend the commercial imperative beyond the boundaries of a state.

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12 Eric Gartzke, "Economic Freedom and Peace," in *Economic Freedom of the World: 2005 Annual Report*, ed. James Gwartney and Robert A. Lawson (Cato Institute, 2005).p.39

13 Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12, no. 3 (1983), ———, "Kant, Liberal Legacies, and Foreign Affairs, Part 2," *Philosophy and Public Affairs* 12, no. 4 (1983).

[S]ince possession of the land, on which an inhabitant of the earth can live can be thought only as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows that all nations stand originally in a community of land, though not of rightful community of possession (*communio*) and so of use of it, or of property in it; instead they stand in a community of possible physical interaction (*commercium*) that is, in a thoroughgoing relation of each to all the others of offering to engage in commerce with any other, and each has a right to make this attempt without the other [*Auswaertige* = foreigner] being authorized to behave towards it as an enemy because it has made this attempt.<sup>14</sup>

Simplifying, everyone has the right to engage in commerce beyond borders because our shared inhabitancy of the earth requires, morally, that all others are permitted to potentially become property owners. Reading Kant in this way, it can be argued that a cosmopolitan law requires commercial relations just as commercial relations found a cosmopolitan law. A global or cosmopolitan civil society and the market can be regarded as to some extent co-constitutive of each other.<sup>15</sup> On the one hand, this echoes the idea, expressed above in relation to Adam Smith, that the market itself confers a certain rationality (or propriety), enshrined in property law and contract, which can be considered as founding a cosmopolitan civil society. On the other hand, it also chimes with a certain reading of Adam Ferguson's account of civil society as that which predates the state and facilitates economic man in his interactions in the market place. Civil society is conceived as a domain not to be encroached by government, at least not without good reason, precisely because it is civil society that founds the market. Viewing the causality in this way might lead us to think that a market can only function properly where civil society has been founded. In this case, there may be more scope for

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14 Kant, *Metaphysics of Morals*, Cit. Howard Williams, "Kantian Cosmopolitan Right," *Politics and Ethics Review* 3, no. 1 (2007). p.64.

15 Ibid.

government intervention such that a civil society, within and beyond the state, exists to facilitate market interaction. Either way, the market is to be left to found civil society (both within and beyond the state) and civil society is to be nurtured by government (again, within and beyond the state) in ways that encourage market interactions. Such activity can, following Kant, be understood as an important aspect of the promotion of peace within and between nations.

### **Liberal Government and Utilitarian Security: Market Cosmopolitan Rationalities**

#### *Classical Liberalism, Freedom and Security*

Liberal government *consumes* freedom in the sense that it, “can only function insofar as certain freedoms exist”.<sup>16</sup> It must therefore *produce* freedom, but, of course, the act of governing must balance this act of production with the possibility of destroying freedom. As Foucault says, “[l]iberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etc”.<sup>17</sup> The ostensibly free market is illustrative; it relies upon particular kinds of behaviour and circumstances, which may, due to innumerable contingencies, not exist at a given time and require government support. The most basic ingredient is the very propriety of buyers and sellers, which might *inter alia* be nurtured in the home or in schools or require the establishment and legal or institutional oversight of technologies

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<sup>16</sup> Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.63.

<sup>17</sup> Ibid. p.64.



such as money and contract. This necessity of control gives rise to conceptualisations of surveillance as epitomised in Bentham's model of the panopticon, which is presented as a general political formula; initially government must supervise in order that it might intervene where the 'natural mechanics' of human behaviour are seen to break down. The emergence of disciplinary techniques that Foucault documents in *Discipline and Punish* "is exactly contemporaneous with the age of freedoms."<sup>18</sup> And such disciplinary techniques later became bound up with biopolitical practices focused on population of the sort outlined in Introduction.

The point is that liberalism is not a blank space of freedom, but always government of population aimed at producing the kinds of freedom thought to result in optimal outcomes to be measured in terms of the economic betterment or welfare of population. Within liberalism, "[w]e have then the conditions for a formidable body of legislation and an incredible range of governmental interventions to guarantee production of the freedom needed in order to govern."<sup>19</sup> It seems then that a liberal art of government, while it relies upon and acts through freedom, its conceptions of freedom are quite particular and need to be organised and produced at minimum cost. We also understand how certain practices focused on territory associated with the police state of *raison d'état* remain important, if for different reasons. While the ends are no longer purely mercantilist, there is nevertheless a need to *secure* a space of freedom cognitively and this often translates into various practices of territorial security. Even market cosmopolitans

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<sup>18</sup> Ibid. p.67.

<sup>19</sup> Ibid. p.65

must decide who can engage in global commerce; who and whose capital can move freely in its space and who must be excluded from this game or socialised into it.

As Foucault notes, strategies of security are “both liberalism’s other face and its very condition”.<sup>20</sup> As intimated, liberals have long been divided on the extent to which a government should seek to establish security for its people and this has variously been portrayed as essential or anathema to freedom, in accordance with Foucault’s insight into the ambiguous relationship between freedom and security. In contrast to an emphasis on the importance of laissez faire associated with Adam Smith, Bentham noted the constitutive nature of security to man’s freedom, but their positions may not in fact be far apart. As Burchell says, “[a]t the end of the eighteenth century, the terms liberty and security had become almost synonymous. At the heart of the processes whose self-regulation government must secure is the individual, the essential atomic element of its mechanics, whose freedom to pursue his or her private interests is absolutely necessary to these processes.”<sup>21</sup> The biopolitical endeavour involves, then, a conception of security that is much broader than the securing of a particular territory or prophylactic measures.

For Bentham it is important to ensure that the interests – individual and collective – that liberal government unleashes do not give rise to collective dangers which might impinge on those individual freedoms which secure market processes.<sup>22</sup> As alluded to above, this

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20 Ibid.

21 Graham Burchell, “Peculiar Interests: Civil Society and Governing ‘the System of Natural Liberty’,” in *The Foucault Effect : Studies in Governmentality : With Two Lectures by and an Interview with Michel Foucault*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991). p.139.

22 Pat O'Malley, *Risk, Uncertainty, and Government* (London; Portland, Or.: GlassHouse, 2004). p.31.

may involve biopolitical and disciplinary dividing practices which distinguish between those who are capable of playing the game of freedom in a given context. Such practices were central to classical liberalism, but the image of the panopticon remains an important aspect of contemporary liberal government, with surveillance and the cognitive and spatial drawing of borders around categories of the free and unfree being a central part of, *inter alia*, immigration policy, social policy and criminal justice, some elements of which will be explored later in the thesis with reference to the government of/in EU(rope).

Of course, the mitigation of collective danger must always be balanced against the liberal emphasis on limited government that *requires* the experience of uncertainty or the dangers associated with this. Not only does liberal government require the individual to experience danger, it is also active in promoting this experience. Bentham was not only making a psycho-ontological point when he referred to the propensity of individuals to look to the future, he also wanted to develop this propensity; the 'yoke of foresight' as he put it. Indeed, the economic imperatives of liberalism required that individuals have an awareness of the future benefits and also future dangers associated with their current practices (laziness, imprudence, unseemliness and so on). As Foucault says, individuals "are conditioned to experience their situation, their life, their present, and their future as containing danger" and what Foucault calls "a political culture of danger" emerges in the nineteenth century.<sup>23</sup> Bentham, for example, notes the importance of "encouraging the

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23 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.66.

spirit of economy and foresight among the inferior classes of society."<sup>24</sup> Savings banks appear, an awareness of crime emerges and there is a proliferation of campaigns concerned with the management of disease and hygiene. Thus, the individual is enjoined to participate in this game of balancing freedoms and security in their own lives through rendering them danger conscious.

Liberal government must safeguard a domain of uncertainty, a domain of freedom, precisely because it is such a domain that will make possible the emergence of self-governing subjectivities. Clearly there is a dynamic relationship between freedom and security here; the security of 'techniques of the self' or the self-governing subject requires danger, threat, uncertainty, *insecurity* (paradoxically), or, positively, freedoms of choice. However, it is the government of a population or policies of security which enable subjects to act *properly* in this domain of free choice; government establishes the conditions which produce particular subjectivities such as the prudent saver, hygienic individual or crime-conscious citizen. At the same time, the space of uncertainty or ostensibly free choice that liberal government offers up permits the possibility of resistance to the liberal subjectivities that government wishes to secure in this space, as discussed in greater detail below. In summary, liberal government's preservation of a space of uncertainty, danger or freedom, is, on the one hand necessary for the promotion of future-regarding liberal subjectivities capable of operating within and, indeed, *operating or governing*, a market which maximises economic performance. On the other

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24 Cit. O'Malley, *Risk, Uncertainty, and Government*. p.32.

hand, this very space might offer the possibility to contest and resist these very subjectivities.

### *Securing Market Subjects: German Neo-liberal Governmentality*

The idea that it is necessary to secure and promote liberal or market spaces and subjectivities via governmental action was supported by a group of German scholars whose ideas gained prominence with their adoption by powerful political allies in the aftermath of the Second World War.<sup>25</sup> This German neo- or ordo<sup>26</sup> - liberalism built upon the foundations of classical liberal scholarship, perceiving the state's very legitimacy to follow from an assessment of its performance of the market making function. As Foucault says, "the institution of economic freedom will have to function... as a point of attraction for the formation of a political sovereignty".<sup>27</sup> According to their doctrine, "[t]he borders and limits of state control should be precisely fixed and relations between individuals and the state determined."<sup>28</sup> There is then a juridical or constitutional element to their approach – a notion of a contractual obligation by state not to intervene in individual freedom – but this is not rooted in a traditional social contract. In the ordoliberal rendering, the social contract or constitution is united with a utilitarian notion. Thus we see the emergence in this German context of an *economic constitution*

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25 Although it should be noted that the ideas themselves emerged much earlier - in the 1920s and 30s, during which protectionism, Keynesianism and economic planning remained important obstacles to the liberal ideal in Germany.

26 The neo-liberals were located in Freiburg after the War and organised around a journal called 'Ordo'. They are sometimes called ordo-liberals or the Freiburg school.

27 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*.

28 Ibid. p.81.

which would, in large measure, find its way into European level government (see Chapter 2).

Just as at the European level an economic freedom, *efficiency* or utilitarian, rationality has been deployed (and continues to be deployed) as a means of trying to legitimise sovereign functions, so in post-war Germany there was a political expediency to the deployment of an economic rationality. The German state required a uniting idea, both in addressing its own people and its political partners, that was not rooted in any traditionalist-statist conception that had proved so damaging in the guise of National Socialism. Neo-liberalism would appease American interests while also offering the people a sense of freedom over their own economic affairs. Thus a juridical framework is presented as creating a space of freedom in the economic domain, since the situation does not permit a juridical power of coercion. In other words, there is an absence of social trust between state and citizenry, not to mention external pressures wary of coercion in the German context.

As Foucault notes, the problematic for this German neo-liberal or *ordo*-liberal school was in one sense quite different from that of the eighteenth century liberals and, indeed, he tried to capture it in terms of its singularity.<sup>29</sup> Whereas the latter were concerned with the question of how to reconcile market freedom with a prevailing police state and an associated juridical notion of freedom, the ordoliberalists were concerned with the question of how to use the concept of economic freedom and competitive free markets as *the very*

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<sup>29</sup> Ibid. p.130.

*foundation* for a post-war German state lacking in legitimacy. As future Chancellor Erhard, one of ordo-liberalism's key political proponents, said in 1948, "only a state that establishes both the freedom and responsibility of the citizens can legitimately speak in the name of the people."<sup>30</sup> For ordoliberalism economic freedom is thus both the state's foundation and its limitation; its guarantee and its security.<sup>31</sup> The deployment of the notion of economic freedoms in this way was never possible for the classical liberals of the eighteenth century; their attempt to promote market rationalities met the considerable adversary of a police state and mercantilist rationality that had long been regarded as legitimate. Governmentally they promoted the mantra 'more state (i.e. wealthier state) via less government'; it was not feasible and perhaps not even within their conception of the possible to consider the free market as the very purpose or *telos* of the state itself.

They were not presented with the political contingencies that emerged after the Second World War: the imperative of peace and the delegitimised post-war German state (or, it could even be said, a *non-existent* state). This was a combination that created the political space for the emergence of the notion of an *economic constitution*, first in Germany and later at the European level. The ordo-liberals' critique of Nazism was, according to Foucault's analysis, rooted in the idea that its pathologies were closely associated with an excessive statist-nationalism or interventionist tendency and that a classical liberalism had not adequately tamed this statist-nationalist rationality. For the eighteenth century liberals the state was still that which defined the free market or 'the space of economic

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30 Cit. Ibid. p.81. Erhard is also often attributed as the architect of the German 'economic miracle'.

31 Ibid. p.102.

freedom'; while the state might have agreed not to enter into this domain, this very boundary drawing function of the state was regarded as problematic for the ordoliberals, precisely because of the potential pathologies or excesses associated with such a role. In the eighteenth century liberal accounts a designated space and role for the state beyond the market remains, even as they set out to reduce this space by freeing the market. In contrast, Foucault tells us, the ordoliberals argue that we should completely turn the formula around and adopt the free market as organizing and regulating principle of the state, from the start of its existence up to the last form of its interventions. In other words: *a state under the supervision of the market rather than a market supervised by the state.*<sup>32</sup> However, this does not mean the absence of government or a *limited* government. Indeed, "[g]overnment must accompany the market economy from start to finish. The market economy does not take something away from government. Rather, it indicates, it constitutes the general index in which one must place the rule for defining all government action. *One must govern for the market rather than because of the market.*"<sup>33</sup>

As elucidated in the following chapter in relation to the formation of the European common market, a similar rationality was privileged and arguably more fully realised in the supranational European context. Indeed, the Treaty of Rome was arguably inspired by ordoliberal ideas and certain key proponents of ordoliberalism were at the centre of its negotiations. In one sense it is the delegitimisation of the state and privileging of the market - to some extent politically achieved by the ordoliberals - which paves the way for

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32 Ibid. p.116.

33 Ibid. p.121.



a governmentality that is not territorially bounded in the same way as were the ideas of the eighteenth century liberals. While, as noted, they had envisaged Europe as economic unit, the importance of nullifying the pathologies of sovereign power via the formation of an economic constitution - and, later, the surrender of sovereignty to its institutional supranational guarantor - was not fully recognised or, indeed, possible.

What Foucault calls the political reversal enacted by the ordoliberals<sup>34</sup> - their re-prioritisation of state and market (or the political and economic constitution) - is, in one sense, that which makes possible the *realisation* of the market cosmopolitan government discussed above. The notion of a transnational or global free market place becomes politically realisable when the state is downgraded in importance or, rather, when its *raison d'être* becomes the service of the market; indeed, the very notion of economic Europeanisation or globalisation becomes a possibility. The notion of Europe as a state-less market<sup>35</sup> is arguably just the next logical step from the state under the supervision of a market; indeed, the market need no longer be bound by state, even as it acts in certain respects as its supervisor. According to certain perspectives on the EU and its antecedents - both liberal and anti-liberal, complimentary and critical - it is the state-less European market, along with its depoliticised regulatory institutions, that is to supervise and, indeed, secure EU member states as market subjects.<sup>36</sup> This idea is picked up and

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34 Ibid. p.117.

35 Paul Kapteyn, *The Stateless Market : The European Dilemma of Integration and Civilization* (London; New York: Routledge, 1995).

36 See, for example, Majone, *Regulating Europe*. And from a more critical perspective, Stephen Gill, "Constitutionalizing Inequality and the Clash of Globalizations," *The International Studies Review* 4, no. 2 (2002), ———, "A Neo-Gramscian Approach to European Integration," in *A Ruined Fortress?: Neoliberal Hegemony and Transformation in Europe*, ed. Alan W. Cafruny and Magnus Ryner (Rowman and Littlefield, 2003).

scrutinised in Chapter 2, where the notion of an economic constitution is discussed in the context of the emergence of European level government.

But what would it mean governmentally for a state to be under the supervision of the market? It would mean, as mentioned, the constitution of the state on the basis of the economy, or, in other words, the formulation of an *economic constitution*; the state is to be constituted not in terms of its granting of political rights to its citizenry, but instead in terms of its commitment to enable the competitive market within and *possibly also beyond* its territory. While the ordoliberals celebrate the market form and, in particular, the governing role of prices in a truly or perfectly competitive market place, they do not consider pure competition to be a 'primitive given' and hence part of government's non-agenda as conceived by classical liberalism. Rather, as history reveals for the ordoliberals, pure competition is fragile, "it can only be the result of lengthy efforts and, in truth, pure competition is never attained."<sup>37</sup> Competition is not then a naturalistic reality, but a normative concept, never to be entirely obtained, but nevertheless the regulative ideal according to which the success of government should be gauged. The economic constitution is thus associated with the need for "permanent vigilance, activity and intervention".<sup>38</sup>

But this is not, and cannot be, a form of government which resorts to planning, price control, public investment or direct and systematic job creation, as the ordoliberals agree

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<sup>37</sup> Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.120.

<sup>38</sup> Ibid. p.132.

with their eighteenth century predecessors that government is not blessed with a perfect knowledge of the economic system and any interventions of this sort can be profoundly dangerous. Of what then, does a liberal interventionism consist? In general terms, it involves securing the tendencies of the self-regulating or perfectly competitive market, which, according to the ordoliberals are, formally, redoubtable, but practically far from inevitable. It consists therefore, firstly, in ensuring that competition is protected from individuals and public authorities that would intervene in the market in such a way that monopoly would result; it is, in a sense, an *anti-interventionist intervention* which in concrete form consists of legal conditions guaranteeing private property and preventing monopoly. Secondly, and in a move also designed to protect the self-regulating competitive market, potentially destructive inflationary forces - of which Germans were acutely aware after their experience of hyperinflation in the 1920s - were to be controlled. In practice, this meant pursuing a policy of credit or the establishment of discount rates, a central feature of contemporary monetary policy, including, of course, the policy of the European Central Bank (see Chapter 2). As Foucault summarises their position: "in a situation of unemployment you absolutely must not intervene directly or in the first place on the unemployment, as if full employment should be a political idea and an economic principle to be saved at any cost. What is to be saved, first of all and above all, is the stability of prices."<sup>39</sup> This is important, because, as Maes says, "...inflation damages the steering function of the price mechanism and creates uncertainty, which hurts investment. It is also important for social reasons, as inflation causes a redistribution of income, to the disadvantage of the weaker groups who cannot protect themselves." In

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39 Ibid. p.139.

practice, "[t]he task of ensuring monetary stability became the responsibility of the, independent, Bundesbank."<sup>40</sup>

Thirdly, and as hinted at in the above, the ordoliberal conception of social policy is not a strongly interventionist one, in the sense that it impacts directly on the market, as a brake or counterweight to it, or as a tool geared towards the easing of economic disparities, in the way in which Keynesian economists, the New Deal and the Beveridge plan envisaged for 'welfare economies'. Indeed, the very regulatory social forces that are privileged by the ordoliberals – market competition and the price mechanism – require differences, not equality, if they are to function properly. As discussed above, the subjects which animate these forces paradoxically require for their security a space of freedom as *insecurity* or uncertainty. Thus, "for the ordoliberals the economic game, along with the unequal effects it entails, is a kind of general regulator of society that clearly everyone has to accept and abide by."<sup>41</sup> Hence, instead of "collectivization by and in social policy", the ordoliberals promote "individualization of social policy and individualization through social policy".<sup>42</sup> This means "according everyone a sort of economic space within which they can take on and confront risks"<sup>43</sup>, or, more concretely, the privatisation of risk and uncertainty via technologies such as individual and mutual insurance and private property. Within this picture, economic growth becomes the pre-eminent goal of social policy and it becomes possible to talk about something called the 'social market

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40 I. Maes, "On the Origins of the Franco-German EMU Controversies," *European Journal of Law and Economics* 17. p.25.

41 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.143.

42 Ibid. p.144.

43 Ibid.

economy', which has found its way into contemporary EU discourses and may even be gaining constitutional significance.<sup>44</sup> In its original rendering, the social market economy permitted socially oriented goals, but not at the expense of the functioning of the competitive market. As presented in EU discourses surrounding the constitutional treaty, the social market economy might achieve even less (the reasons for which are elaborated in Chapters 2 and 6).<sup>45</sup> In general, we see a move from a welfare economy to a social investment economy that has affinities with a contemporary third way politics that has found its way into EU(ropean) government (see Chapter 6).<sup>46</sup>

As Foucault notes, "the German ordoliberals could not fully recognise themselves in German policy".<sup>47</sup> This was due to the coexistence of their governing rationalities with important vestiges of a nineteenth century sovereign or statist rationality in Germany, particularly its much-discussed 'organised' or 'co-ordinated' model of capitalism.<sup>48</sup> However, it has been argued that the ordoliberal faith in the market was, rather than in conflict with an organised capitalism, in fact to some degree *dependent* on the ability of private capital - and in particular the banking system - to facilitate stable investment in place of a Keynesian state intervention.<sup>49</sup> Related to this, the unitary nature of the 'ordo'

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44 On this notion's presence in the contemporary EU see, in particular, Christian Joerges and Florian Rödl, "'Social Market Economy' as Europe's Social Model?," in *EUI Working Paper* (Florence: EUI, 2004). Note that this notion is also central to the EU's recently published 'Europe 2020' strategy (the successor to the Lisbon strategy, discussed in Chapter 6).

45 Ibid. pp.16-20.

46 For a discussion of this, see: Donzelot, "Michel Foucault and Liberal Intelligence." pp.124-136.

47 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.145.

48 Peter A. Hall, *Varieties of Capitalism : The Institutional Foundations of Comparative Advantage* (Oxford: Oxford Univ. Press, 2001).

49 For a discussion of the relationship between organised capitalism and ordoliberal thought see, for example, Christopher S. Allen, "Ordo-Liberalism Trumps Keynesianism: Economic Policy in the Federal

project should not be overstated. Indeed, there existed some important divergences among its protagonists with the likes of Müller-Armack - who coined the term 'social market economy' - emphasising the possible tensions (as well as, like his fellow 'ordos', the synergies) between free markets and social justice and at times entertaining some redistributive policies.<sup>50</sup> While it might be true, then, that a pure *market* ordoliberalism was not directly reflected in German policy, a more flexible conception of the ordoliberal project might allow for the identification of a greater resemblance between programme and practice.<sup>51</sup> Potential flexibility notwithstanding, it could certainly be argued that an ordoliberal programme found a much purer representation at the level of European government, as it evolved from the 1950s onwards, as will be discussed in greater depth in Chapter 2. Suffice to say here that *the very fact* of a global, post-national or – of particular interest to this thesis - *European* market and its government *relies upon* something like the ordoliberal reversal discussed above.<sup>52</sup>

There are notable differences between the German school of neo-liberalism discussed so far and its better known relative, an American neo-liberalism. For example, the former tends to emphasise a strong governing role for the state in constituting and enabling market competition, while the latter, in generalising a market logic to the governing functions of the state itself, rhetorically privileges a small, 'efficient' government, even as

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Republic of Germany " in *Monetary Union in Crisis: The European Union as a Neo-Liberal Construction*, ed. Palgrave (London: 2005).

50 Ibid. p.206.

51 See, for example, Klaus Dieter John, "The German Social Market Economy - (Still) a Model for the European Union," *Theoretical and Applied Economics* 3, no. 3 (2007). Joerges and Rödl, "'Social Market Economy' as Europe's Social Model?."

52 Christian Joerges, "What Is Left of the European Economic Constitution? A Melancholic Eulogy," in *The Academy of European Law* (European University Institute, Florence: 2004), Joerges and Rödl, "'Social Market Economy' as Europe's Social Model?."

this itself is constitutive of important positive practices.<sup>53</sup> Moreover, as alluded to above, at least some German ordoliberals might have a quite different conception of what constitutes the private or market realm given their experience and (at times) promotion of an *organised* capitalism. Notwithstanding these important differences, Foucault convincingly traces the more neo-liberal ideas on social policy emanating from the 'Freiburg school' to the emergence of an American neo-liberalism rooted in the ideas of the 'Chicago school'. Even in the late 1970s, when he delivered his lectures on liberalism, neo-liberal ideas of both varieties were beginning to strongly influence public policy makers throughout the western world, including in Foucault's native France and Europe more generally. Of particular interest for this thesis, the *individualization of and through social policy* described by Foucault was becoming an important feature of liberal government.

#### *Securing Individual Market Subjects: American Neo-Liberalism*

Developing the ideas of the ordoliberals, a contemporary neo-liberal governmental agenda tends to discern a particular market society and particular 'subject of interest', but this is a society and subjectivity which government must constantly create and a market domain which it must constantly extend. As Foucault says, "American neo-liberalism involves... the generalization of the economic form of the market. It involves

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53 For a more detailed description of the differences, as found in Foucault's analysis, see Lemke, "The Birth of Bio-Politics: Michel Foucault's Lecture at the College De France on Neo-Liberal Governmentality."

generalizing it throughout the social body and including the whole of the social system not usually conducted through or sanctioned by monetary exchanges."<sup>54</sup>

On the one hand, neo-liberal rationalities have sought to expand the notion of a common market to domains beyond Europe, via institutions such as free trade and, contemporaneously, the WTO; in this sense it can be said that the playing field for the game of market competition is actively expanded. They build upon the ordoliberal reversal; the idea that the market governs states or governs government itself. This, of course, has implications for contemporary EU(rope) itself, which, to the extent that it is considered to be a united entity with agency, considers that it is forced to play on this global playing field. It is in such a context that the single market project emerged and that the EU established for itself the goal of becoming the most competitive knowledge economy globally with its Lisbon agenda of 2000 (explored in greater detail in Chapter 6). On the other hand, and related to this, neo-liberal government promotes the market as a generalisable framework and competitiveness or enterprise as a generalisable telos, not only for states and/ or supranational institutions, but also within populations or societies; indeed, it becomes a tool for governing all social relations, not only economic relations. As will be demonstrated in later chapters, with reference to the government of contemporary European social policy, governing technologies have, in accordance with this conception of neo-liberal government, conducted what Foucault calls 'an economic analysis of the non-economic'. They have sought to construct markets in non-economic domains, for example in the domain of society and work.

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54 *ibid.* 243



As Foucault notes, "classical political economy has never analyzed labour itself, or rather it has constantly striven to neutralize it, and to do this by reducing it exclusively to the factor of time."<sup>55</sup> Concerned with analysing relational mechanisms of capital, investment and production, classical liberals did not, from a neo-liberal perspective, sufficiently focus on human behaviour, internal rationality or the strategic programming of individuals' activity. The neo-liberals re-render the worker; he is no longer merely an object in economic analysis, "but an active economic subject" and the wage is reconceived as a return on capital.<sup>56</sup> The notion of 'human capital' invented by Chicago school economists thereby links the abilities or skills of the worker (capital) with a possible earnings stream and in such an understanding "the worker himself appears as a sort of enterprise."<sup>57</sup> Following from this, whereas the classical liberals conceive of homo oeconomicus primarily as 'a partner of exchange', for the neo-liberals "homo oeconomicus is an entrepreneur, an entrepreneur of himself."<sup>58</sup> The entrepreneur thus becomes a generalisable figure in a way that classical liberals never imagined possible. As O'Malley says,

In marked contrast to their neo-liberal descendents, classical liberals never imagined all, or even a substantial proportion, of their subjects to be entrepreneurs.... Entrepreneurs were [...] a privileged and exceptional class, given special licence and protection in order to engage in the creative uncertainty that effectively was inaccessible to most.<sup>59</sup>

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55 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.220.

56 Ibid. p.223.

57 Ibid. p.225.

58 Ibid. p.226.

59 O'Malley, *Risk, Uncertainty, and Government*. p.33.

In neo-liberal government the prudent liberal subject of the classical liberals is thus re-rendered as a risk-taking, competitive entrepreneur; a once marginal and mysterious figure becomes the model for the behaviour of all, even as it remains unclear and contested as to exactly what being an entrepreneur entails or what are its benefits.<sup>60</sup> Indeed, it is the entrepreneur who offers-up the innovation that is necessary to economic growth and the existence of entrepreneurs is understood as a function of investment in human capital. Of course, once human capital appears in an important field of knowledge/power it makes sense that it is something that both governments and subjects should concern themselves with. Specifically, we see a focus on a host of policy domains, often grouped together as 'supply side policies', including education and professional training, but also a much broader array of biopolitical endeavours – *inter alia* child care, health care and migration – which might be conceived by governments and individuals as 'investments' in capital.<sup>61</sup> For example,

Migration is an investment; the migrant is an investor. He is an entrepreneur of himself who incurs expenses by investing to obtain some kind of improvement. The mobility of population and its ability to make choices of mobility as investment choices for improving income enable the phenomena of migration to be brought back into economic analysis.<sup>62</sup>

With reference to freedom of movement and ideas associated with migration policy in contemporary European government, it can be seen that the migrant has been conceived

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<sup>60</sup> This is elaborated in Chapter 6. Here, extrapolating from Spicer et al. it suffices to say that there is much disagreement in economic discussions over which categories are entitled to call themselves entrepreneur and the benefits that should accrue to this category vis-a-vis other significant categories such as workers, landlords and capitalists. Campbell Jones and Andre Spicer, "Outline of a Genealogy of the Value of the Entrepreneur," in *Language, Communication and the Economy*, ed. Guido Erreygers and Geert Jacobs, *Discourse Approaches to Politics, Society, and Culture*, V. 16 (Amsterdam; Philadelphia: John Benjamins Pub., 2005).

<sup>61</sup> Foucault, *The Birth of Biopolitics: Lectures at the College De France, 1978-79*. pp.228-30.

<sup>62</sup> Ibid. p.230.

in such terms. However, only certain categories of migrant are able to move freely and operate as this ideal-type entrepreneur. Indeed, it is important to highlight that the abovementioned securitising or dividing practices are still very much a feature of a 'neo' liberal European government in relation to the question of migration and other issues.<sup>63</sup> Moreover, a legal cosmopolitan rationality – replete with its preoccupation with territorial integrity, borders and republican citizenship - remains ever-present in European migration policy (as discussed in detail below and in Chapter 4).

Migration and the other areas mentioned are not new policy domains, but as a market cosmopolitan rationality emerges they are rethought in terms of human capital and sometimes explicitly in terms of the constitution of entrepreneurial subjectivities. As Foucault noted in the late 1970s, "we are seeing the economic policies of all the developed countries, but also their social policies, as well as their cultural and educational policies, being oriented in these terms."<sup>64</sup> The importance of an American neo-liberalism and, specifically, an entrepreneurial subjectivity is a theme that I pick up later in the thesis (particularly in Chapter 6) in relation to contemporary EU(ropean) government and, specifically, in relation to so-called 'soft' governance in social policy areas.

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63 See, for example, Matthew B. Sparke, "A Neoliberal Nexus: Economy, Security and the Biopolitics of Citizenship on the Border," *Political Geography* 25, no. 2 (2006). Louise Amoore, "Risk, Reward and Discipline at Work," *Economy and Society* 33 (2004).

64 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.232.

## Liberal Government and Social Security: Legal Cosmopolitan Rationalities

So far a cosmopolitan government has been conflated with the classical and neo-liberal conceptions of limited or economic(al) government geared towards maximising economic performance. Liberal rationalities expand, or even privilege, markets and commerce, with potentially irenic effect. It has also been argued that liberal rationalities, which are rooted in the 'subject of interest', are entirely compatible with various forms of disciplinary government intervention which secures the space for the competitive market processes that liberal political economy of various sorts celebrates. Moreover, I have alluded to the ways in which practices once associated with the 'subject of right' - based on the sovereign idea of *raison d'état* and the consent provided in the social contract - are not necessarily defunct, but might be reconceived as serving utilitarian ends in such forms as the economic constitution. Indeed, the space of uncertainty or ostensible freedom required by economic government is a space in which a discourse of rights can emerge. That said, following Foucault, and as noted above, the contractarian rationality and the 'subject of right' that it precipitates, assesses government in a very different manner to the classical liberals. While *homo oeconomicus* says to government 'you must not because you cannot know', *homo juridicus* says to government 'you must not because I have rights entrusted to you'.<sup>65</sup> Economic man is sceptical of government whereas legal man depends upon government.

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<sup>65</sup> Ibid. p.282.

As mentioned in Introduction, one of the major contentions of this thesis is that it is the utilitarian economic calculus that dominates contemporary governmental rationalities, certainly at the EU(ropean) level of government, even as they fuse with a juridical, constitutional discourse. However, that is not to say that cosmopolitanism entirely discards the social contract, or that contemporary liberal government – in contemporary EU(rope) or elsewhere – does not draw on such a governing rationality in various ways. The question is then, how does a cosmopolitan perspective, both theoretically and in practice, seek to unite the ‘subject of interest’ with the ‘subject of right’? The remainder of this section discusses the ways in which a cosmopolitan perspective might seek to integrate sovereign rationalities into the cosmopolitan market picture that I have so far painted. Later chapters will explore the ambiguous relationship between the ‘subject of right’ and ‘subject of interest’ in terms of concrete practices of government within the contemporary EU.

Liberal government, according to the utilitarian calculus, consists, as has been elaborated, in ensuring that self-interested subjects are free to maximise their utility within the market place. However, as discussed, there is significant room within the liberal conception of limited government to disagree on the extent to which the market must be governed in order that it produces the maximum possible utility or welfare and this is reflected in tensions and disagreements, reflected both in the discipline of political economy, broadly conceived, and within liberal governmental practices in Europe over time. As Burchell says,

Liberal government is pre-eminently economic government in the dual sense of cheap government and government geared to securing the conditions for optimum economic performance. There is a sense in which the liberal rationality of government is necessarily pegged to the optimum performance of the economy at minimum economic *and socio-political* cost. And yet *there are no universally agreed criteria for judging the success of government in this respect.*<sup>66</sup>

While a neo-liberal perspective might conflate economic performance and socio-political welfare, many liberal and cosmopolitan perspectives consider such welfare or security in much broader terms and note that economic performance might not always be so easily reconciled with concepts of welfare or security. Indeed, Adam Smith's qualification that free capital movement must 'obey the laws of justice' can be regarded as evoking a much more substantive justice than that offered by this free movement itself. It is in this process that many ostensibly liberal theorists smuggle in, explicitly or implicitly, the contractarian rationality associated with sovereign power that classical liberal political economy had apparently displaced in the eighteenth century. Indeed, while, along with Hume, Kant rejected the notion of an *original* contract as historical reality, he drew on it as an important *ideal*, which would establish the legitimacy of governmental interventions, whether those be laws or institutions. As he says,

The act by which the people constitute themselves a state is the original contract. More properly, it is *the Idea* of that act that alone enables us to conceive of the legitimacy of the state. According to the original contract, all the people give up their external freedom in order to take it back again immediately as members of a commonwealth, that is, the people regarded as the state. Accordingly, we cannot say that a man has sacrificed in the state a part of his inborn external freedom for some particular purpose; rather, we must say that he has completely abandoned his wild, lawless

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<sup>66</sup> Graham Burchell, "Liberal Government and Techniques of the Self," in *Foucault and Political Reason : Liberalism, Neo-Liberalism, and Rationalities of Government*, ed. Andrew Barry, Thomas Osborne, and Nikolas S. Rose (Chicago: University of Chicago Press, 1996). p.26 emphasis added.

freedom in order to find his whole freedom again undiminished in a lawful dependency, that is, in a juridical state of society, since this dependency comes from his own legislative Will.<sup>67</sup>

The social contract operates for Kant as the ideal device via which the rationality and therefore legitimacy of a particular state, law or institution is determined. He encourages a thought experiment for the assessment of the legitimacy of a currently existing law or institution; we ought to ask of any such entity whether the people (here he focuses on the people within a given state, but this might be expanded) would have *rationally consented* to it had they been engaged in negotiating a social contract or some such device. There is, of course, a question about what constitutes rational consent and elsewhere Kant appears to permit that decisions on what is reasonable might be made by a few rather than the many.<sup>68</sup> Nevertheless, Kant provides us here with a preliminary sketch of the substantive Rawlsian original position (Rawls of course owes much to Kant) in which individuals might be thought to behave rationally, unencumbered by knowledge of their own social status. For both Kant and Rawls the social contract offers a device via which the rationality of self interested actors might be assessed. We might therefore derive from the social contract a theory of justice.<sup>69</sup> A theory, in other words, which allows us to assess the abovementioned *socio-economic cost* of any prevailing governing system on the basis of whether all might have rationally consented to those costs; would those costs have been in the collective interest from some pre-social position? There is an attempt then, to reconcile the 'subject of right' and the 'subject of interest'. The 'subject of interest'

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67 From Rechtslehre, cited in Jeffrie G. Murphy, "Hume and Kant on the Social Contract," *Philosophical Studies* 33, no. 1 (1978). p.72. emphasis added.

68 Tully, "The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives." p.355.

69 Murphy, "Hume and Kant on the Social Contract."

is rendered *rational* only if he engages in a thought experiment, which assesses his interests not in terms of his current situation, but in terms of some principle of fairness.

But, we might wonder about this cosmopolitan reintroduction of the 'subject of right' into these considerations of government. Is not the law, under liberal government, simply to be that which permits the functioning of a free and self-interested market society, as in the ordoliberal's ideal formulation? And is not this market society coterminous with a cosmopolitan civil society and a public sphere? We are at the heart here of an important tension in modern liberal government. While on the one hand, there is something convincing about the idea that the expansion of commercial space might make possible the expansion of an ethical space in which deliberation, hospitality and even a certain conception of justice is possible, on the other hand, it is possible that *homo oeconomicus* is in some senses destructive of a solidarist ethic. The competitive market place brings people together, but it also, quite clearly, pits them against one another in various ways, as emphasised most clearly by Marx and his followers. While civil society organised into discrete states might be divided along national lines, civil society organised in accordance with market principles might be divided along socio-economic or class lines. There is, in other words, an ontological ambiguity in the relationship between social and economic man. Foucault notes that,

[T]he bond of economic interest occupies an ambiguous position in relation to these bonds of disinterested interests [in civil society] which take the form of local units and different levels... Formally...civil society serves as the medium of the economic bond... [But], while it brings individuals together through the spontaneous convergence of interests, it is also a principle of dissociation... with regard to the active bonds of compassion, benevolence, love for one's fellows, and a sense of



community, inasmuch as it constantly tends to undo what the spontaneous bond of civil society has joined together by picking out the egoist interest of individuals, emphasising it.<sup>70</sup>

In other words, the economic bond is made possible by civil society, but it might at the same time undermine the 'disinterested' bonds of civil society through a privileging of an egoistic 'subject of interest'.

From a utilitarian perspective, Hume would likely identify the endeavours of social contract theorists as a form of the *constructive* or *ideal rationalism* that he opposed. It is inevitable from a Humean perspective that, "we will build into our model of rationality a substantial number of our current beliefs and feelings about what is morally and socially correct."<sup>71</sup> Similarly, with regard to Rawls, although he derives "first principles from a *hypothetical choice situation*", he cannot achieve the neutrality he seeks. Why would we derive principles of justice from his *fair* 'original position' in the absence of some *telos*? Arguably a truly abstracted subject will tend to nihilism, not justice. Viewed in this way, the social contract is little more than a device for trying to convincingly transform a subjective interest in justice or moral equality into a transcendental principle. This reintroduction of the 'subject of right', can, in other words, be perceived as a tactic of government which acts as a corrective to a narrowly conceived perception of self interest as the pursuit of economic wealth.

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70 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. pp.302-3

71 Murphy, "Hume and Kant on the Social Contract." p.74.

However, it is important to highlight that it is a tactic that classical liberals such as Hume and Smith would also accept despite their concerns regarding the fabricated or rhetorical nature of a social contract upon which it is sometimes constructed. Thus, for example, a sense of justice is important for Hume, not because of this construct, but because it is a *convention* which permits the accordance of a public good with self-interest: “[i]nstead of departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both these interests, than by such a convention; because it is by that means that we *maintain society*, which is so necessary to their well-being and subsistence, as well as to our own.”<sup>72</sup> Similarly, according to Force, Adam Smith “understands the pursuit of self-interest in a very restricted sense: self interest requires an explicit transaction, the use of rational calculation, and a *social organization that makes the transaction possible*. In that sense, self-interest is far from being a general explanatory principle.”<sup>73</sup> Moreover, Watson highlights the importance of “the role of imagination” in Smith’s theorising, which, in practice, might amount to something similar to Rawls’ hypothetical choice situation: the ability to display ‘moral sentiments’ and empathise with other(s).<sup>74</sup> In governmental terms, the proximity of these ostensible utilitarian theorists of the ‘subject of interest’ with Kant is notable; both conceive of the importance of changing the subject’s understanding of their interest in a manner that draws on a legal ‘subject of right’. Such a proximity is explicable in terms of the very paradox identified by Foucault; the ‘subject of interest’ and ‘subject of right’ are at once

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72 Pierre Force, *Self-Interest before Adam Smith : A Genealogy of Economic Science*, Ideas in Context, 68 (New York: Cambridge University Press, 2003). p.211.

73 Ibid. pp.261-2.

74 Matthew Watson, *Foundations of International Political Economy* (Basingstoke, Hampshire: Palgrave Macmillan, 2005). Pp.114-5.

reconcilable and repelled and this paradox is itself to be found within the works of many eighteenth century liberal scholars (for further elaboration on this argument see Chapter 6).

So, the social contract as disembedded ideal offers a corrective to the self-interested egoism of embedded market subjects, while still holding on to an ontology which places self-interest at the ontological centre. It attempts to reconceive self-interest via the imaginary of an original position that ensures the interests of all and the particular interest are coterminous. It introduces a social (solidaristic) and democratic sensibility into the 'subject of interest', indirectly calling upon the 'subject of interest' to consider the position of others through considering what governmental arrangements might be in *their* interests if they were unaware of their particular endowments. Simplifying, this can be conceived as the introduction of a degree of pity, sympathy or compassion into the assessment by the self-interested agent of governmental arrangements. This is an ontology which questions what Hume called 'the selfish hypothesis' and was, interestingly, on many occasions endorsed by thinkers such as Hume and Adam Smith who are more typically associated with the 'subject of interest'.<sup>75</sup>

For some, this concern with justice established via social contract might lead us away from a spatial conception of the global established by Kant; indeed, it might not be easily reconciled with a vision of the cosmo-polis. Perhaps this concern with democratic

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<sup>75</sup> For an excellent analysis see, Force, *Self-Interest before Adam Smith : A Genealogy of Economic Science*. Also see Chapter 6 for more on this.

consent and solidarity is why ultimately Kant's own Perpetual Peace and Rawls's Law of Peoples both emphasise the importance of nation-state-like entities (for Rawls 'peoples') within which it is possible or realistic to imagine the essentially solidaristic thought processes advocated by both.<sup>76</sup> Similarly, despite his appropriation by contemporary neo-classical economists, for Smith, it is the wealth of *nations* that is the primary concern of his most famous work on liberal economics. Only within a state-like entity will the associative bonds be strong enough to imagine the possibility of any consensus which, *inter alia*, makes possible the functioning of the market.

Similarly, although he might not usually be considered within the contractarian tradition, Habermas's emphasis on the importance of consensus around a 'constitutional patriotism' within a community leads him to visualise a contemporary united Europe in relatively narrow and closed terms as I will discuss in some detail later in the thesis.<sup>77</sup> This is a patriotism which extends beyond the belief in the regulatory power of the market as described by ordoliberals to encompass more diverse and antagonistic accounts of freedom, including social and economic freedoms alongside economic or competitive freedoms. Indeed, Habermas would be sceptical about the claim that there has been a genuine coalescence around an economic constitution (essentially the enshrinement in law of competitive market principles as the telos of government in Europe) (see Part II).

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<sup>76</sup> John Rawls, *The Law of Peoples* (Boston: Harvard University Press, 1999).

<sup>77</sup> Jürgen Habermas, *The Postnational Constellation* (Cambridge: Polity Press, 2001).

While German social democracy has in practice – famously at Bad Godesburg – and in theory reconciled itself to elements of the ordoliberal form of governmentality, for Habermas it is imperative to reflect upon the democratic qualities of any supposed *neo-liberal* consensus. For instance we might wonder whether the constitutionalisation of an economic doctrine and the governmentality associated with this became a political imperative that the socialists – in Germany, in EU(rope) and elsewhere - simply could not refuse, or whether they were complicit in the constitutionalisation itself. As Foucault asks, with reference to German socialism,

How could a socialist party, whose at least long term objective is a completely different economic regime, be integrated into this political game, since the givens had been reversed, so to speak, and it was the economic that was radical in relation to the state, and not the state that was primary as the historical-juridical framework for this or that economic choice? Consequently to enter into the political game of the new Germany, the SPD really had to convert to these neo-liberal theses, if not to the economic, scientific, or theoretical theses, at least to the general practice of this neo-liberalism as governmental practice.<sup>78</sup>

Later in this thesis I will reflect on similar questions and trends in relation to the contemporary EU (see, in particular, Chapter 6) whose institutional antecedent was arguably both implemented, legitimised and sustained on a similar basis to that envisaged by ordoliberals for the post-war German state – essentially an economic constitution.

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<sup>78</sup> Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.90.

Foucault traces the German social democrats' "adherence to a type of governmentality that was precisely the means by which the German economy served as the basis for the legitimate state." (p.89). The protection of private property in the means of production is conceded on the condition that this is rendered compatible with an equitable social order. For Foucault, Bad Godesburg represented "the acceptance of what was already in the process of functioning as the economic-political consensus of German liberalism." It was as much about 'entry into the game of governmentality' (p.91) as it was a renunciation of socialism/Marxism.

Of course, not all contemporary contractarian theorists draw the conclusion that closure around community is required in order for consensus-based justice to be possible. Indeed, "the Rawlsian version of the original contract, on which many [contemporary] liberal egalitarian theorists rely [has] generated a startling profusion of interpretations."<sup>79</sup> For cosmopolitan thinkers such as Beitz, the values that underpin Rawls' 'justice as fairness' principle can be taken to imply that Rawls' 'veil of ignorance' should be extended spatially, because the borders within which we are born are no less arbitrary than skin colour, gender or our genetic make-up.<sup>80</sup> The suggestion is that if we are serious about establishing fair conditions, then citizenship must not be particular. In this sense, it is often argued that Kant's world citizen can be legitimately imagined contemporaneously in a way that Kant could not practically envisage. Beitz, for example, perceives in conditions of interdependence "the existence of a global scheme of social cooperation".<sup>81</sup> Interdependence is moving us towards a global society that might realise the basis of a global 'co-operative venture'. Indeed, as noted with reference to the predicament of German socialism, it might not be a case of wondering whether it is possible to democratically establish constitutional democratic arrangements beyond the state, so much as wondering whether it is still possible to do so at the level of the state.<sup>82</sup>

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79 Terry Nardin, "Alternative Ethical Perspectives on Transnational Migration," in *Free Movement*, ed. Brian Barry and Robert E. Goodin (New York: Harvester Wheatsheaf, 1992). p. 275.

80 Owen Parker and James Brassett, "Contingent Borders, Ambiguous Ethics: Migrants in (International) Political Theory," *International Studies Quarterly* 49, no. 2 (2005).

81 Charles Beitz, *Political Theory and International Relations* (Princeton, New Jersey: Princeton University Press, 1979). p. 144.

82 See, for example, Bohman, *Democracy across Borders : From Demos to Demoi*.

Certainly a number of practically engaged cosmopolitan theorists are interested in reflecting on precisely such questions.<sup>83</sup> While they do not explicitly draw on a contractarian tradition, their ideas contain more than a residue of such a rationality. For example, in the work of many deliberative democrats the importance of democratic consensus is a central test of government and is privileged above liberal government's market test. As argued above, a neo-liberal cosmopolitan governmentality which applies the market test and promulgates the market form in global civil society, relies upon a particularly narrow form of knowledge; a narrowly conceived ontological and/or normative account of the egoistic human subject which translates into a host of governmental policies. Applying the democratic test in place of the market test, what I call a juridical or legal cosmopolitan rationality, is arguably less restrictive in the forms of knowledge that it permits for government. Government is not the outcome of an *a priori* form of knowledge established by an elite, but the outcome of an ongoing and *dynamic* democratic debate and deliberation. The transcendent universalism of a Kantian constitutionalism and of a neo-liberal belief in the market are, so many proponents of a contemporary juridical cosmopolitanism would argue, undermined when government is continually subjected to deliberation among affected parties (see Part III).

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83 For example, David Held, "Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective," *Government and Opposition* 39, no. 2 (2004), Held and Archibugi, *Cosmopolitan Democracy: An Agenda for a New World Order*.

### *Cosmopolitan Government and Ontological Security*

As illustrated later in this thesis (see, in particular, Chapter 6), a deliberative governmentality is not necessarily the open space of dialogue and consensus that its proponents might imagine. Indeed, as has been noted, the very idea of government, let alone the idea of *European, global or cosmopolitan* government, at some level requires an ontological consensus or agreement to emerge from a plural reality and such a consensus is, we are told, something to be valued. Following Kant, a more or less thin transcendental notion of rationality or public reason is frequently deployed by such cosmopolitans in order to establish the conditions within which consensual politics might be rendered possible and a public sphere becomes the valued space for such reason to play out within the domain of civil society. As I will explore in more detail later in later chapters, there is a will to knowledge in these cosmopolitan accounts, which can tend towards, or be used for, prescriptive agendas geared towards the collective public good. As discussed above, it is such pretensions to knowledge that the eighteenth century classical liberals railed against and today many neo-liberals would continue to oppose.

Indeed, the promotion of a solidaristic or consensual ethic by the likes of Habermas is not without its own potential ethical violences, as will be discussed in detail in relation to the contemporary government of the EU (see, in particular, Chapters 4 and 6). Indeed, we ought to note that a sensitivity to such violence lies at the heart of economic liberal thought; perhaps never more so than for neo-liberals, such as Hayek, who, in the context



of their direct experience of Nazism, perceived state intervention in the free market as the thin end of the wedge of a full-blown totalitarianism.<sup>84</sup> Perhaps ironically these economic or market liberals accuse these promoters of a solidaristic social justice of tending towards a kind of 'one-dimensionality' that the Nazis – or at least certain scholars favoured by the Nazis – had, foreshadowing Marcuse, perceived in capitalism itself.

More generally, it is certainly important to recognise that the ontological foundations for a juridically oriented cosmopolitanism are frequently rooted in a residual eurocentric imperialism. Kant, for example, while he advocated a move away from Europe at the centre of world empires towards Europe at the centre of a cosmopolitan federation, still perceived Europe at the centre of his vision, both geopolitically and cognitively. While contemporary cosmopolitan theorists have eschewed Kant's explicit ranking of cultures and civilizations (Kant unambiguously placed Europe at the top<sup>85</sup>) it can certainly be argued that eurocentric vestiges and an associated developmental logic remains very present in the writings of many modern cosmopolitan democrats, including Habermas (see Chapter 4).

As has been said, the very notion of government, particularly a cosmopolitan government, requires a consensus which itself is necessarily built upon and requires the

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84 Foucault gives voice to these neo-liberal concerns: "What you are preparing for yourself with the Beveridge plan is quite simply Nazism. On the one side you battle with the Germans militarily, but economically, and so politically, you are in the process of repeating their lessons. English labour-style socialism will lead you to German-style Nazism." It is perhaps ironic that it was a British government under Thatcher which would become the European promoter in chief of these Hayekian ideas in later years. Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. p.110.

85 Tully, "The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives." p.341.

imposition of a knowledge or conditionality, even in the most reflexive of deliberative accounts. It can be said then, that both a cosmopolitan rationality which draws primarily on a conception of the economic 'subject of interest' and that which draws primarily on a conception of the juridical 'subject of right' draw certain borders, both cognitive and spatial and these borders have their concomitant ethical implications; they shape, constitute, assimilate and exclude a variety of subjectivities. It is such ethical implications that I will explore in relation to contemporary cosmopolitan liberal government in Europe in the remainder of this thesis.

## **Conclusion**

This chapter has extrapolated from Foucault's genealogy of liberal government in order to understand the constitution of a cosmopolitan government. The emergence of a biopolitics informed by political economy in the eighteenth century was critical to the privileging of the market as a site of veridiction for governmental practices. Such a mode of government was geared towards facilitating commercial freedoms which would, in accordance with the insights of Kant and others, facilitate peaceful relations within and between nation-states. However, the chapter has emphasised throughout that the emergence of liberal government ought not to be understood as limited government – at least not when government is understood in the Foucauldian sense of 'the conduct of conduct'. Indeed, a biopolitics seeks to secure particular subjectivities in/for liberal society. The space of freedom afforded by liberal government is conditional on the

welfare-maximising behaviour of the governed; their freedom from the influence of a sovereign police state is dependent upon successful self-government.

A German neo-liberal rationality represents both continuity and break with its classical precursors. It adopts a market logic, but extends it beyond the scope envisaged by a classical liberalism, keen to chip away at a police state. Indeed, for the German neo-liberals the market is no longer supervised by the state; rather the state is supervised by the market. An American neo-liberalism seeks to generalise even further the logic of the market into non-economic domains, including into social life itself. Thus, its biopolitical endeavour involves promoting and generalising the subject of entrepreneur (discussed with reference to contemporary EU 'governance' in Chapter 6).

In adopting market as a general index of government, such a rationality arguably paves the way for a deterritorialised government of the sort manifest in 'global governance' and, of particular significance for current purposes, European-level government (see Chapter 2). Such a rationality of government serves, then, as a condition of possibility for the emergence of a liberal post-national government in Europe, while the turn to a distinctly American neo-liberal rationality represents the condition of possibility of the practical deepening of market rationalities associated with the single market discussed in Chapter 2, as well as the drive for competitiveness associated with the Lisbon Agenda discussed in Part III. Such knowledge/power nexuses are also that which makes possible an array of associated *liberal internationalist* theories of post-national integration and governance – *inter alia*, a liberal intergovernmentalism, a regulatory state theory and a

teleological liberal functionalism highlighted in Introduction – that frequently fail to recognise their own particular conditions of possibility.

However, as intimated throughout, the prevalence of market cosmopolitan rationalities is not an inevitable consequence of the development of a liberal government and associated knowledges and biopolitics in the domestic realm. The foregoing genealogy makes clear that, to paraphrase Foucault, this is at best an *unsteady victory*.<sup>86</sup> Indeed, in practice, there has been no final victory for a market cosmopolitan government in the face of a legal cosmopolitan government rooted in the image of sovereign. Liberal government is itself a space of/ for significant disagreement from within which a sovereign or social-contractarian rationality – rooted in a concept of solidarity, public good or compassion – has never been entirely displaced. It is the possibilities and limits of such resistance that I will turn to in Parts II and III of this thesis. That said, the very fact that legal cosmopolitan rationalities are considered as ‘resistance’ in this context, is suggestive of the fact that it is a market cosmopolitan government that is considered to be prevalent in contemporary Europe, particularly in European level government.

The claim that market cosmopolitan rationalities represent the condition of possibility for, and have prevailed in, contemporary European level government is developed in the following chapter. While in this chapter I have shown how liberal rationalities made it possible to *conceive* of a European economic unit and its purpose, the genealogy provided

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86 As Foucault said, a genealogist “must be able to recognise the events of history, its jolts, its surprises, its *unsteady victories* and unpalatable effects.” Michel Foucault, “Nietzsche, Genealogy, History,” in *The Essential Works of Foucault, Vol. 2, Aesthetics, Method and Epistemology*, ed. James D. Faubion (London: Allen Lane, 1998). p.373.

in Chapter 2 will outline the ways in which these rationalities have to some extent come to fruition with the *realisation* of a European economic unit. Again, this is certainly not presented as a deterministic history of the inexorable rise of transnational capital or integration of markets, but the subject of important political contingencies which permitted the emergence and corresponding suppression of important nexuses of power/knowledge.

## Chapter 2: A Genealogy of Liberal Government in Europe II: Realising a European Economic Unit

### Introduction

This chapter provides a brief and necessarily episodical genealogy of the manifestations of a liberal and neo-liberal government (discussed at length in Chapter 1), in the institutional realities of European level government. In particular, it gives an overview of the governmental strategies via which such modes of governing were increasingly promoted as the *raison d'être* and, later, guiding rationality, of a European level government. In other words, I attempt to show how a market liberal mode of government, bound up with an irenic intent, informed the initial substantive period of European integration in the post-war period and how economic rationalities were gradually extended via the establishment of the EEC and the single market project. Largely in accordance with European integration's prevailing narrative of itself I acknowledge, then, important continuities or path dependencies in this process. In particular, I highlight the centrality and gradual extension of a market cosmopolitan rationality, largely to the detriment of early post-war dreams of a legal cosmopolitan government at this level. Indeed, the point is that the institutions' own functionalist teleology - based on a temporal logic of ever closer union - has largely been rooted in the extension of market rationalities, and this has had a performative or self-fulfilling effect on EU(ropean) realities. However, in accordance with the genealogical method discussed in Introduction, the emergence of a market cosmopolitan liberal government at the European level is not conceived as an inevitability, nor as a seamless, rupture-free

process. Indeed, the very idea of liberal government has involved internal debates in this contemporary European context, mirroring to some extent the theoretical debates that were highlighted in Introduction and Chapter 1 between legal and market cosmopolitan rationalities and, indeed, within these two rationalities of government. Thus, even as I sometimes over-determine the reality of a market cosmopolitan government in Europe, it should be recalled that such a reality is subject to ongoing political struggle and resistance within European societies and various governmental practices and institutions. As noted towards the end of this chapter, a legal cosmopolitan rationality is very much present in various features of contemporary EU(rope). Similarly, I remain sensitive to the ruptures *within* a market cosmopolitan rationality, particularly in terms of the various “subjects of interest” that they promote and *secure* in Europe. I demonstrate, then, the limitations of a liberal internationalism which underpins many of those contemporary international political theory and European studies literatures highlighted in Introduction, teasing out what I term their market cosmopolitan rationalities.

Of course, a genealogy of this sort could fill several volumes rather than a single chapter, so it is again important to emphasise that the archive from which it draws is necessarily selective and, in accordance with a Foucauldian understanding (see Introduction), incomplete. This genealogy is intended primarily as a first step in the animation of the theoretical discussion elaborated in Chapter 1 in the concrete context of the emergence of European level government, where liberal rationalities have, to a large extent, been embedded and realised. In this chapter I am not, then, concerned with writing a comprehensive history, rather I seek to write a ‘history of the present’ that accomplishes three things: a) it highlights the contingent emergence of a particular market

cosmopolitan rationality at the European level of government and its constitutive role in the formation of this level of government, b) it traces the development of this rationality in terms of its variations discussed in Chapter 1 and highlights the ways in which it has been politically secured in European level government and c) it briefly foreshadows more detailed discussions of the difficult relationship between market and legal cosmopolitan rationalities in the context of contemporary EU government in later chapters. In particular, through its discussion of the constitutive importance of market cosmopolitan rationalities to EU(rope) as realm of post-national government, the chapter foreshadows the conditions of (im)possibility for the legal cosmopolitan discourses that have been mobilised as resistance to market EU(rope) (discussed in Chapter 1 and again in Chapter 6).

The chapter proceeds, in four main sections. The first briefly outlines the way in which early twentieth century and post-war discussions of European unity, rooted primarily in a legal cosmopolitan vision, increasingly became bound up with – and to some extent displaced by – a market cosmopolitan rationality; the idea that the creation and extension of markets establishes peace across the continent was particularly significant. Thereafter, it addresses the ways in which a functionalist narrative of market integration animated the discourses that both founded and influenced the first supranational European institution, the European Coal and Steel Community (ECSC), and were later central to the formation of the EEC and, indeed, subsequent market integration. The second section, traces the emergence of an economic constitution and the relevance of German neo-liberal or *ordoliberal* ideas – especially the ordoliberal reversal mentioned in Chapter 1 – to this process. In particular it discusses the establishment and development of this



constitution via an analysis of the role of the European Court of Justice (ECJ) in interpreting the Rome treaty and via a discussion of monetary union as the culmination of an ordoliberal rationality. The third section turns to the the situating of Europe as an economic space in a global context, the promotion and government of competitive market subjects 'all the way up and all the way down' via a more general analysis of the evolution of the single market project and the embrace of a (US) neo-liberal rationality of government. Such a story acts as a prelude to a more focused and detailed discussion of the EU's Lisbon agenda in Chapter 6. Anticipating Part II, the fourth section qualifies the foregoing argument by highlighting the ways in which the legal cosmopolitan imaginary which lay at the heart of many post-war projects for European unity has never been entirely displaced in the realities of European level government.

## **From Legal to Market Cosmopolitan Europe**

### *Political Ends, Economic Means*

The economic logic, which was central to European integration, was also, at least in the post-war period, bound up with the desire for a pacific Europe or a cosmopolitan Europe. Such connections were not necessarily to the fore in the immediate aftermath of the war, when, understandably, peace was privileged. Indeed, the focus was cosmopolitan primarily in the legal sense enunciated in Chapter 1. In other words, proponents of European unity foresaw the building of a common citizenship, a broader social contract between the governed and government; a de- (or perhaps re-) territorialisation of human

rights as a response to the anti-human(ist) horrors of war and, particularly Nazi totalitarianism and the holocaust. Such ideas were central to Winston Churchill's famous Zurich speech of 1946, in which he called for the construction of a "United States of Europe" built upon 'an enlarged patriotism and common citizenship'<sup>1</sup>. Churchill advocated as a first step towards this end the formation of a Council of Europe, which, of course, would be officially formed three years later in 1949. While some saw the Council of Europe as the harbinger of Churchill's United States of Europe, in practice it developed a narrow remit which focused on the Europeanisation of a human rights and democratisation discourse via a number of treaties. It could certainly be credited with some achievements with regard to the nurturing of a legal cosmopolitanism – most notably the ECHR and ECtHR – but, disappointingly for the federalist movement, it had few powers that would have enabled it to nurture the sort of interdependence or cross-border civil society which would, for many, be required in order to construct the substantive sense of 'common citizenship' that Churchill advocated and many contemporary legal cosmopolitan critics continue to support and promote (see chapter 3). Indeed, the Council of Europe was and, indeed, remains, a largely intergovernmental organisation.

Of course, even during this period, it was thought by many that this idealist legal cosmopolitan rationality was necessarily bound up with an economic or market cosmopolitanism. The Statute of the Council of Europe is concerned not only with

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<sup>1</sup> A Boyd and F Boyd, "Winston Churchill's Speech at Zurich, 19 September 1946," in *Western Union* (London: Hutchinson, 1948).

human rights and democracy in the legal sense, for their own sake, but also alludes in its very first article to the fact that unity around such ideals would facilitate social and *economic* progress.

While many recognised the theoretical advantages of a common market, its governing implications would involve – as in the example of the United States and its 1787 constitution, in which it established a central executive and legislative - the centralisation of authority and the consequent limitations on national sovereignty that could not, for political reasons, be easily achieved. The necessity to surrender some degree of sovereignty over economic government in order to achieve a meaningful union was recognised by Jean Monnet, who is often considered to be the architect of the modern European project. His influence, along with French foreign minister of the time, Robert Schuman, in the formation of what is usually considered as the first effective European institution, the ECSC in 1951, is of central importance. His basic insight was that ‘deadlock’ could only be escaped via “concrete action on a limited but decisive point, bringing about in this point a fundamental change and gradually modifying the very terms of all the problems”.<sup>2</sup> His approach echoed the functionalist ideas of the likes of Mitrany and was also to a large extent reflected in the later analyses of Ernst Haas<sup>3</sup>, inasmuch as it claimed that it was possible to identify social and economic processes where pressing common interests existed. These common interests would make co-operation more likely in these narrowly defined contexts or markets, while avoiding the

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2 Jean Monnet, ‘Memorandum to Robert Schuman and Georges Bidault’, 4 May 1950 cit. in David Weigall and Peter Stirk, eds., *The Origins and Development of the European Community* (Leicester and London: Leicester University Press, 1992). p.57

3 Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*.

substantial question of sovereignty in general until such a time as the initial step had provoked a change in 'the terms' of the political debate; until a 'political spillover' occurred whereby societies and their leaders started to believe in a conception of common, European sovereignty. Concretely, it was the establishment of an overarching authority in the important industrial area of coal and steel which, for Monnet, offered just such a site of common interest or an opening for the development of supranational principles.

Monnet's proposal is thus at once pragmatic and radical or idealist. On the one hand integration is a slow process and the formation of the ECSC is designed to alleviate one potential cause of future war, World War II and its military sustenance having been linked *inter alia* to the capture of the coal and steel industries by the German national government. In particular, as stated in the Schuman Declaration, "[t]he solidarity in production will make it plain that any war between France and Germany becomes not merely unthinkable, but *materially impossible*."<sup>4</sup> On the other hand its very slowness is the reason that it might lead to a genuinely supranational outcome, where idealistic endeavours such as the League of Nations or Council of Europe had failed. Recent history had shown Monnet that the notion of a League or union might be rendered meaningless without a degree of supranationalism that had hitherto not been achieved in Europe. The long term inspiration for this community certainly lay in the popular political desire of the time to establish a pacific federal Europe and both Schuman and Monnet were quite clear that the ECSC should represent but one small step in that

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<sup>4</sup> The Schuman Declaration, 9 May, 1950.

direction. Indeed, Monnet envisaged a time where a reformed Council of Europe would become a truly supranational government and the ECSC would be integrated within this organisation.

Such reasoning may seem to run contrary to the ideas proposed by many proto-federalists, such as Aristide Briand, who had argued that the economic hardships that would be wrought by economic union could only be possible once a political union of some sort existed.<sup>5</sup> In both theory and practice, of course, it is difficult to simply untangle the economic and the political in the case of European integration. This was noted by Haas, who stated that, "[t]he supranational style stresses the indirect penetration of the political by way of the economic because the 'purely' economic decisions always acquire political significance in the minds of the participants."<sup>6</sup>

This was certainly the case in the context of the founding of the ECSC, which, while rooted in an economic rationale was of clear political significance for all those involved – decision makers, the industries and member state publics. Indeed, the economic orientation of the ECSC was itself a political decision rooted in the extension of a liberal rationality of government to a post-national domain. As German Chancellor Adenauer, a key political supporter of the Monnet-Schuman plan, stated in the Bundestag:

[T]he political meaning of the ECSC, is infinitely larger than its economic purpose....[F]or the first time in history, certainly in the history of the last

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5 Aristide Briand, 'Memorandum on the Organisation of a Regime of European Federal Union' 17 May 1930. Cited in Weigall and Stirk, eds., *The Origins and Development of the European Community*. p.14.

6 Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*. p.297

centuries, countries want to renounce part of their sovereignty, voluntarily and without compulsion, in order to transfer the sovereignty to a supranational structure.<sup>7</sup>

Such a view brings into question the idea that with the ECSC it was an economic union that preceded a political and social union; arguably a degree of the latter was required in order to constitute the former. In theory, as noted in Chapter 1, liberal cosmopolitan thought traditionally suggests that the constitutive causality between economic and social or political man may run in both directions; indeed, reading this literature holistically, it becomes clear that the two may be co-constituted. Leaving aside for the moment the idea, also enunciated in Chapter 1, that economic and social man might *at the same time* be in potential conflict, it might be asserted that the following logic was at play: economic integration or the expansion of markets in certain sectors brings people together and builds trust, but the very expansion of markets also requires some degree of initial trust, or, in other words, a political commitment. Certainly in his memoirs, Monnet, in reflecting on the ECSC and the work of the High Authority, holds the view that these institutions fostered a European sensibility<sup>8</sup>, although one wonders how far and wide such a sensibility was manifest beyond the ranks of the experts who constituted and surrounded the authority.

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7 Konrad Adenauer, Chancellor of the Federal Republic of Germany, in the *Bundestag*, 12 July 1952. Cited in Weigall and Stirk, eds., *The Origins and Development of the European Community*. p.67.

8 « L'expérience n'en avait jamais été faite, alors comment les Européens séparés par des frontières auraient-ils pu ressentir leur solidarité et imaginer leur unité ? Maintenant une preuve existait, et, parmi tous nos visiteurs, nombre de journalistes et d'universitaires venaient de loin pour l'observer. » Jean Monnet, *Memoires* (Paris: Fayard, 1976). pp. 440-441.

Monnet and Schuman believed in the notion that an economic union – a market cosmopolitanism - could foster the social conditions for a more substantive political union – perhaps even a substantive social contract or legal cosmopolitanism - and foresaw the founding of an original trust among nations in the all-crucial willingness of participant member states to sacrifice or *pool* some degree of their sovereignty in the context of the ECSC. They believed that the expansion of common markets that this pooling permitted would set in motion a spiralling of levels of trust to a point where integration in one area might ‘spill-over’ into other areas. Their progressivist/functionalist conception of societal and economic actors led them to consider a *European* social and economic man as mutually constitutive in the politics of integration. In other words, the market as domain of veridiction is at the heart of their functionalist view of the world.

This rationality has been sustained in the narratives that the European institutions tell about European integration as a continuous, progressive process via which a logic of market cosmopolitanism is expanded. The concern in this thesis is not whether such narratives are ‘true’ nor whether it is primarily states (as say intergovernmentalists) or supranational and non-state actors (as say neo-functionalist) which have driven the process of elevating the truth status of such a narrative; indeed, there is clearly an interdependence between state, non-state and supranational actors in the promotion of a governmental rationality. Rather, my interest in this chapter is in the ways in which this narrative has emerged and been promoted as prevailing truth for many subjectivities in the European context and the impact that this has on alternative narratives. While many mainstream or hegemonic accounts have tended to understate the extant resistance to a

market rationality and/ or dismiss the validity of the rationalities from which this resistance emerges, the existence of alternative truths ought not be understated. Before turning to look explicitly at the instances of resistance to a rationality of market cosmopolitan government (briefly at the end of this chapter and in subsequent chapters), I turn in the next section to consider in greater depth some of the concrete ways in which a market cosmopolitan narrative has been deployed and, to some extent, secured, in Europe.

### *Dirigiste Liberal Government: Constituting Market Subjectivities*

The structures of the ECSC owed much to what Walters and Haahr call a 'high modernist' logic. They note that the knowledges from which Monnet draws are those of planners, engineers and technocrats. He advocates an administrative structure based around small groups of such experts working within larger bureaucracies and draws on technologies such as the balance sheet in order to make legible the entirety of an industrial sector and, in the case of Europe, promote a 'general view' and even a 'general will'. Such a general European view permits a planning agency, such as 'the High Authority', to persuade various actors of the needs for particular changes which may not otherwise be apparent to them and eventually persuade them of the need to implicate themselves in a European form of governing.<sup>9</sup> Clearly such methods draw from the contingencies of Monnet's own particular experiences of French *dirigisme* and, in particular, a modernist planning rationality and this suggests the need for caution about

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<sup>9</sup> Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*. pp.32-3



drawing direct parallels between contemporary EU government and the institutions of the ECSC. Nonetheless, while the methods and goals may have altered, important continuities can be noted, such as the promotion of free market spaces, the use of expertise to achieve such ends and the deployment of various forms of *concertation* as a means of influencing economic actors' behaviour. Such elements remain at the heart of contemporary liberal government in/of EU(rope), even as the conception of what can constitute a market space has considerably altered.

Certainly a liberal rationality lay at the heart of the Schuman plan. In one sense this project was the first to establish Europe as an economic unit in practical (rather than only theoretical) terms. As Walters and Haahr put it, "the interventions of the High Authority and the European Community more generally, bring a new visibility to the space of the European economy... [T]hey ...enable Europe to be seen in new ways."<sup>10</sup> As noted in Chapter 1, this spatial (and cognitive) expansion of economy is a central feature of the genealogy of classical liberal thought. Certainly in the days of the ECSC the idea of a common European market was central to the endeavour to nurture a European sensibility: "the High Authority was ...committed not just to removing tariffs, unfair subsidies and ending quotas on trade in the areas of coal and steel, but *the enhancement of competition in a properly transnational common market.*"<sup>11</sup>

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<sup>10</sup> Ibid. p.31

<sup>11</sup> Ibid. p.33

We might wonder why Monnet – a socialist and modernist planner - put this emphasis on competition. On the one hand - and as intimated in the previous chapter in the discussion of ordo-liberalism in the German context - a free market agenda might be particularly conducive to justifying the establishment of new juridical sovereign powers, inasmuch as such a juridico-technocratic government can be portrayed as *securing freedom* rather than constraining it. On the other hand, it could also be understood in terms of an attempt to curry favour with a US administration concerned about the creation of cartels in these industries and its own economic opportunities in Europe.<sup>12</sup> Certainly this was the contention of critics of the ECSC as it was formulated by Monnet and Schuman. For example, French politician Pierre-Etienne Flandin, argued at the time that the enlargement of markets owed much to a US influence on the formulation of the treaty:

[T]he enlargement of the market is the fashionable panacea. Does it not permit a diminution of the cost price by mass production organisations, via the geographical transfer of production to more favourable areas, via the concentration of technical advances? This fall in cost price - so sales price -, doesn't it also permit an increase in buyers and mean an indefinite growth in production, eliminating crises? The system assures at once full employment and social progress, because the increase in productivity makes possible salary increases. One can remark at what great care these various elements of the American neo-capitalist doctrine are enumerated in the [ECSC] treaty, which accepts them as essential goals for the High Authority.<sup>13</sup>

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12 Desmond Dinan, *Ever Closer Union : An Introduction to European Integration* (Boulder, Colo.: L. Rienner Publishers, 1999). p.22; Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*. p.33

13 My translation. Original version: "l'élargissement du marché est la panacée à la mode. Ne permet-il pas de diminuer le prix de revient par l'organisation de la production de masse, par le transfert géographique de la production aux points les plus favorables, par la concentration du progrès technique? La diminution du prix de revient, donc de vente, ne permet-elle pas de solliciter un nombre croissant d'acheteurs et, par là-même, d'accroître presque indéfiniment la production, en éliminant les crises ? Le système assure à la fois le plein emploi et le progrès social, car l'augmentation de la productivité rend possible les hauts salaires. On remarquera avec quel soin ces divers éléments de la doctrine du néo-capitalisme américain sont énumérés dans le projet de traité qui les accepte comme buts essentiels à atteindre par la Haute Autorité directrice du

The sardonic manner in which Flandin connects the *general* logic of market expansion to a *specific* 'American neo-capitalist doctrine' provides an interesting subversion of the very logic he describes. Indeed, he problematises the self-evidence associated with the logic of market expansion through rendering particular a rationality which, as noted, in functionalist guise has pretensions to an evolutionary universalism. Moreover, it alerts us to the broader power-knowledge nexus within which the ECSC's liberal goals were enunciated. It is possible to trace the influence of US anti-trust legislation and the US Fair Trade Commission, as well as the imperatives of the Marshall Plan in the practices and goals of this nascent European community.<sup>14</sup>

The ECSC establishes a form of liberal government at European level concerned with regulation and market making. And as hinted at in the above words of Flandin, the freeing of the pricing mechanism, accompanied by its close regulation, was central to the establishment of this government<sup>15</sup>. As Walters and Haahr put it,

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pool. » Pierre-Etienne Flandin, "Le Plan Schuman - Aspects Politiques," *Nouvelle Revue de l'économie contemporaine* Numéro spécial: Le Plan Schuman, no. 16-17 (1951).

14 Haas, *The Uniting of Europe; Political, Social, and Economic Forces, 1950-1957*, John Gillingham, *Coal, Steel and the Re-Birth of Europe 1945-1955 : The Germans and French from Ruhr Conflict to Economic Community* (Cambridge: Cambridge University Press, 1991).

15 Article 60

1. Pricing practices contrary to the provisions of Articles 2, 3 and 4 are prohibited, particularly:

- unfair competitive practices, in particular purely temporary or purely local price reductions whose purpose is to acquire a monopoly position within the common market;
- discriminatory practices involving the application by a seller within the single market of unequal conditions to comparable transactions, especially according to the nationality of the buyer.

2. For the above purposes:

- (a) the prices scales and conditions of sales to be applied by enterprises within the single market shall be made public to the extent and in the form prescribed by the High Authority after consultation with the Consultative Committee; if the High Authority deems that an enterprise has chosen an abnormal base point for its price quotations, in particular one which makes it possible to evade the provisions of subparagraph (b)

The High Authority makes the pricing mechanism into a technology of European government... The task was not to set prices but to encourage commercial actors to exercise [their] freedom in responsible ways. Not only were some companies unfamiliar with price competition, in some countries and sectors they were unused to the right of being able to set prices. Monnet displays a classically liberal understanding of liberty when he notes that 'business as well as consumers will have to undergo a veritable apprenticeship in liberty.' The objective becomes one of constituting the coal and steel industries as a self-regulating domain populated by responsible economic actors, agents who begin to resemble industrial citizens.<sup>16</sup>

A hint is offered here of the way in which a dirigiste form of governing connects up with the promotion of a liberal rationality; how, in other words, market rationalities, far from an extant feature of industrial actors, or something to which they would tend through the imperatives of the *natural* market, were governmentally produced. Competitive subjectivities were, via a strict oversight of the pricing mechanism, *constituted*. The notion of a liberal dirigisme becomes explicable when the opposition to the ECSC treaty from some industrialists and the widespread fear of an omnipotent 'denationalised planner' is considered.<sup>17</sup> Indeed, it could be argued that Monnet's proposal for the ECSC was *dirigiste* precisely because it was rooted to a significant extent in a classical liberal rationality which, in the face of national(ist) level opposition, sought the expansion of

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below, it will make the appropriate recommendations to that enterprise... ECSC, "Treaty Constituting the European Coal and Steel Community," (Paris: April 1951).

16 Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*.p.34

17 « Sont interdits, enfin, — sans doute par référence à la législation anti-trusts des Etats-Unis, — tous accords entre entreprises, toutes décisions et pratiques concertées qui tendraient à empêcher, restreindre ou fausser le jeu normal de la concurrence et en particulier : à fixer les prix, restreindre ou contrôler la production, le développement technique ou les investissements, à répartir les marchés, produits, clients ou sources d'approvisionnement (article 65).... Cette énumération fastidieuse met en relief, mieux que tout commentaire, les pouvoirs considérables de la future Autorité. Ses « sujets », mines de fer, aciéries et charbonnages, auront pratiquement perdu la maîtrise de leur gestion au profit d'un Directoire de « planistes » dénationalisés. » Louis Lacoste, "Notre Fer En Péri," *Nouvelle revue de l'économie contemporaine* Numéro spécial: Le Plan Schuman, no. No 16-17 (1951). pp.42-45.

certain industrial markets, a corresponding limitation of national level government of those markets and the promotion of competition between commercial entities rather than states. Such tensions were apparent in the early years of the ECSC when, in practice, national governments used tools such as fiscal policy in order to foster competitive advantages for their industry and such (ostensibly unfair) practices provoked arguments in favour of fiscal harmonisation, which, of course, continue to be heard in contemporary EU(rope).<sup>18</sup>

Indeed, the emergence of the ECSC illustrates a point elaborated in Chapter 1; namely, the way in which a liberal rationality is not geared towards non-government, but always itself requires some sort of government, disciplining or securing. This is not to say that the liberal High Authority is all dominating, in the Foucauldian sense; as noted above, its task is rather one of constructing liberal subjectivities in accordance with its governing rationality. Practically this was achieved through the use of 'price publicity' across the relevant sectors and throughout the community which created 'a sort of industrial public sphere'.<sup>19</sup> In other words, such publicity promotes a subjectivity of self-regulation in accordance with market discipline. Indeed, it can be regarded as the beginning of a European tradition of market making government which promotes market subjects. The

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18 "It is most important that the High Authority use all its influence to persuade the Community's Member States to become aware of the inescapable necessity of co-ordinating and harmonising the fiscal policy of the six countries, as a result of the opening of the carbon and steel common market." "Plan Schuman Et Souveraineté Fiscale Des États", *Luxemburger Wort* (1954), [http://www.ena.lu/plan\\_schuman\\_souverainete\\_fiscale\\_etats\\_luxemburger\\_wort\\_juillet\\_1954-010201949.html](http://www.ena.lu/plan_schuman_souverainete_fiscale_etats_luxemburger_wort_juillet_1954-010201949.html).

For contemporary arguments see for instance.:

Euractiv, "France and Germany Push for EU Harmonised Corporate Tax," (14 May 2004), <http://www.euractiv.com/en/enlargement/france-germany-push-eu-harmonised-corporate-tax/article-117859>.

19 Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*. p.35

Community as market is rendered as a visible or 'legible' space wherein, "it is the gaze of fellow industrialists, or the watchful consumer as much as the scrutiny of the Community official which is to accomplish the ends of a European industrial community."<sup>20</sup>

## **An Ordoliberal Economic Constitution: Extending Market Subjectivities**

### *Ordoliberal Rationalities I: The EEC*

Many of the ideas of the ordoliberals were embodied in the Rome treaty.<sup>21</sup> As Manow et al. put it, "...the political economy of the EEC treaty came close to the ordoliberal conception that Hallstein, Böhm and Müller-Armack had promoted in the negotiations: the ECJ guarded competition, non-discrimination and market opening, while blocked decision making in the Council shielded against interventionist temptations."<sup>22</sup> Joerges goes even further in emphasising the role of ordoliberal ideas:

The fact that Europe had started its integrationist path as a mere economic community lent plausibility to ordoliberal arguments – and *even required them*: in the ordoliberal account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based

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<sup>20</sup> Ibid.

<sup>21</sup> Ordoliberals, such as Müller-Armack –who coined the term 'social market economy' – and his political master, Economics Minister Erhard were directly involved in the negotiations of the Spaak committee and their ideas are clearly apparent in the treaty. See: David J. Gerber, "Constitutionalizing the Economy: German Neo-Liberals, Competition Law and the New Europe," *American Journal of Comparative Law* 25 (1994). Joerges and Rödl, "'Social Market Economy' as Europe's Social Model?," p.14

<sup>22</sup> Philip Manow, Armin Schäfer, and Hendrik Zorn, "European Social Policy and Europe's Party-Political Center of Gravity, 1957–2003," in *MPIfG Discussion Paper* ed. Max Planck Institute for the Study of Societies (Köln: 2004). p.22

order committed to guaranteeing economic freedoms and protecting competition by supranational institutions.<sup>23</sup>

The ordoliberalists supported the 'decoupling' of social and economic issues; the supranational government would not need to concern itself with the inherently political questions of social and redistributive politics. Indeed, this level of government was concerned solely with the apolitical job of managing the economic constitution that the Rome treaty enacted; in particular the removal of 'barriers' to trade and the enforcement of a strict competition policy. As Joerges says, "the economic constitution was unpolitical in the sense that it was not subject to political interventions. This was its constitutional-supranational *raison d'être*."<sup>24</sup> There was, then, in this very constitutive moment the outline of what some would later call the 'regulatory' government or state in Europe; a state or government working primarily *for* the market; a government concerned with *legitimacy as output* – particularly economic performance – rather than *legitimacy as input* – democratic deliberation and so forth.

In accordance with the narrow economic remit of the EEC, the liberal subjects promoted within the Rome Treaty confer a market cosmopolitan rather than juridical cosmopolitan ontology (the preserve of member states). They are "defined in relation to categories of economic and social activity, by virtue of their function in the operation of economic processes".<sup>25</sup> Indeed, freedom is rendered as freedom of movement for persons (workers), services and capital. It is,

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23 Joerges, "What Is Left of the European Economic Constitution? A Melancholic Eulogy." p.16

24 Ibid. p.17

25 Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*. p.47.

...a tool, a technology for the achievement of specific governmental objectives, such as stability, development and rising standards of living. These objectives have replaced individual freedom as political imperatives: It is not liberty which defines the borders and forms of political authority and government. It is the objectives of harmonious economic development, balanced expansion, stability, raised living standards and 'closer relations' between the member states.<sup>26</sup>

Thus, for example, freedom of movement is in fact a conditional freedom; it is essentially the right to seek employment beyond the borders of one's own member state. Government at the European level is, in accordance with the ordo-liberal preference, to be conducted in the name of the economy – now a *European* economy – and notions of freedom are important only to the extent that they permit economic growth. On the other hand, juridical or social-contract conceptions of freedom remain the preserve of the member states and are worked out in the inherently *political* constitutional-democratic processes of social/ welfare policy making according to the particular contingent preferences and political traditions of the member states' governments.

In the treaty, these two notions of freedom only converge to the extent that member states must accord the same economic and social rights to non-nationals from community states as they do to nationals (Articles 51, 121). Other areas in the treaty that might be regarded as social policy, broadly conceived, concur with the ordoliberal market-making conception of social policy. For example, the European Social Fund is explicitly tasked with increasing 'geographical and occupational mobility' of workers (Articles 117-128)

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26 Ibid. p.45.



and articles related to education emphasise the importance of mobility and vocational training (Articles 126-7). The subject of the Rome Treaty is a passive and objectified one whose freedoms are granted and defined in accordance with a set of economic imperatives. Freedom is not, as in a juridical conception of freedom – with its rhetorical emphasis on the *inalienable rights of man* - itself the imperative of governmental action.

As noted, while these ordoliberal-inspired subjectivities were promoted at the European level of government, a juridical conception of freedom remained of significance within the member states; the economic constitution enunciated at Rome did not – at least not initially - trump the legal or political constitution at home. As Scharpf notes, “[i]t does not follow from the text of the Treaties of Rome or from their genesis that the Community was meant to abolish [the] constitutional parity between the protection of economic freedom and market-correcting intervention.”<sup>27</sup> Indeed, it has even been claimed that the Treaty of Rome, in permitting free trade and therefore greater prosperity in domestic settings, was according to some accounts actually a facilitator of the expansion of social welfare in EEC member states. Indeed, theorists of customs union have noted that “free traders and protectionists alike [have] thought that customs unions in general supported their cause.”<sup>28</sup>

Indeed, the Treaty of Rome would not inevitably crystallise into a *privileged* constitutional form embedded *within* the member states. Legal cosmopolitan rationalities of

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27 Scharpf, “Negative and Positive Integration in the Political Economy of European Welfare States.” p.18.

28 Alan S. Milward, *Politics and Economics in the History of the European Union* (Oxon: Routledge, 2005). p.3

government – or *political* constitutional settlements - at the level of European nation-states offered an important alternative to the economic constitution, even as these sovereign states agreed to be bound by the treaty. Indeed, a substantive constitutionalisation of the economic constitution more deeply within Europe was not the initial outcome of the formation of the EEC. As Joerges says, “[s]ocial policy was treated as a categorically distinct subject. It was a/the domain of political legislation and, thus, had to remain national... [F]or a decade or so, the balance seemed stable.”<sup>29</sup> Indeed, a ‘Keynsianism at home’<sup>30</sup>, or an ‘embedded liberalism’<sup>31</sup> seemed possible in both the context of European government and globally in the context of the Bretton Woods arrangements.

However, ECJ jurisprudence came to represent an important element of what Wallace has called ‘informal integration’<sup>32</sup> (in contrast to the formal integration manifest in the treaties that intergovernmental accounts like to emphasise). Indeed, according to many quasi neo-functionalist accounts, in practice the ECJ has interpreted the formalised treaties in such a way as to promote a market rationality further than many of the initial proponents of the Rome treaty had anticipated. According to some such accounts it was an informal expansion of a market rationality – fostered and promoted by various ‘European’ market actors via the ECJ – that culminated in the single European market project. For instance, Mattli notes that the Rome Treaty envisaged the ECJ as the institution before which *member state* and *Commission* claims of non-compliance would be

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29 Joerges, "What Is Left of the European Economic Constitution? A Melancholic Eulogy." p.17.

30 Gilpin and Gilpin, *The Political Economy of International Relations*.

31 John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order " *International Organization* 36, no. 2 (1982).

32 William Wallace, *Regional Integration : The West European Experience* (Washington, D.C: Brookings Inst., 1994).

heard. However, as he says, “the treaty evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on *all legal persons and entities, public and private*, within the European Union.”<sup>33</sup>

He goes on to note the importance of one provision in the treaty of Rome which offered a significant opportunity to those seeking to promote the deepening and expansion of a market cosmopolitan rationality:

Almost as an afterthought, Article 177 authorizes the Court to issue ‘preliminary rulings’ on any question involving the interpretation of Community law arising in the national courts. Lower national courts can refer such questions to the ECJ at their discretion.

[...]

In practice, the Article 177 procedure served as a channel of corporate pressure and demands for deeper integration. *It established the framework for the constitutionalization of the Treaty* by providing links between the Court and subnational actors... *The various identities, motivations, and strategies of litigants have inevitably influenced the nature and pace of integration.*<sup>34</sup>

In practice, this article has facilitated both activism before the ECJ for those seeking the extension of market rationalities and moments of jurisprudence by the ECJ (and later, proposals for legislative amendment from other ‘commitment institutions’ such as the Commission<sup>35</sup>) from which emerges the principle of *direct effect* and, thereafter,

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33 Walter Mattli, *The Logic of Regional Integration : Europe and Beyond* (Cambridge: Cambridge Univ. Press, 1999). p.73. My emphasis.

34 Ibid. My emphasis.

35 Ibid. pp.99-101.

inexorably, the principle of ECJ *supremacy*.<sup>36</sup> Direct effect refers to the citizens' ability to enforce a right granted by European Community legislation against the state (vertically) or against other legal entities such as individuals or companies (horizontally). Supremacy refers to the priority of the treaties and ECJ jurisprudence over domestic member state law.

Thus, the Rome Treaty gradually becomes a true economic constitution in the sense that it is to be interpreted not only by member states interested in balancing social-contract and market rationalities, but also entities – private actors, ECJ and 'commitment institutions' - seeking to push the limits of the market cosmopolitan rationality with little regard for, or even at the expense of, *social* contractarian rationalities. It could be argued, then, that those industrial actors which were initially constituted and socialised as market participants within the ECSC framework are now invited to play a role in the further and deeper constitutionalisation of the market rationality from which they believe they have prospered and can prosper further. Both the emergence of these corporate market subjects and their European sensibility and influence is reflected, *inter alia*, in the emergence and successful lobbying efforts of European big business – particularly of the European Roundtable of Industrialists (ERT) - in the run up to the Single European Act (SEA).<sup>37</sup> The CEOs of the multinationals which were part of the ERT had the ear of

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36 As Wincott notes, the Court and the Legal Service of the European Commission were well aware that direct effect would effectively grant supremacy to the ECJ and this was formally established just a year later: "Those closely involved with the debates and deliberations when these issues were first considered by the Court were well aware that the direct effect of Treaty provisions was to imply the supremacy of Community law and vice versa." Daniel Wincott, "A Community of Law? 'European' Law and Judicial Politics: The Court of Justice and Beyond," *Government and Opposition* 35 (2002). p.13.

37 Mattli, *The Logic of Regional Integration : Europe and Beyond*. pp.78-80. Maria Green Cowles, "Setting the Agenda for a New Europe: The Ert and EC 1992," *Journal of Common Market Studies* 33, no. 4 (1995). See also,

ministers and heads of state in their own countries, as well as Commission at European level. They saw Europe as the opportune and appropriate scalar level to create what they perceived as a truly single market.<sup>38</sup>

It is perhaps not surprising that the European institutions supported the calls of big business via the ERT which essentially confirmed and sought to extend their *raison d'être* in the face of national-level resistance. Indeed, the adoption of the SEA (1986) had been championed in the Delors Commission Internal Market White Paper (1985) and a strategy to continue on the road towards an internal market of undistorted competition was detailed in the so-called Cecchini report (1988). While developments towards the *ordo-liberal constitutionalisation* of this project depended on a number of contingencies, the single market project was presented as part of a broader and seamless narrative of integration; it aimed at *completing* the internal market and thus *realising* the more substantive aims of the earlier Rome treaty:

The Customs Union was the first objective of the Treaty of Rome. But that it was *by no means intended as the last* is clearly demonstrated by the fact that what the Treaty established was the European Economic Community. The preamble to the Treaty starts with the declaration:

"Determined to lay the foundations of an ever closer union among the peoples of Europe, resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe [...]

Just as the Customs Union had to precede Economic Integration, so *Economic Integration has to precede European Unity*. What this White Paper proposes therefore is that the Community should now take a further step

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from a different and more critical perspective, Bastiaan van Apeldoorn, "Transnational Class Agency and European Governance: The Case of the European Round Table of Industrialists," *New Political Economy* 5 (2000).

38 Secretariat ERT, "Changing Scales," (Paris: Roundtable of European Industrialists, 1985).

along the road *so clearly delineated in the Treaties*. To do less would be to fall short of the ambitions of the founders of the Community...<sup>39</sup>

The route and goals are, and always have been, clear according to the Commission: customs union precedes economic integration, precedes unity and in the mid-1980s the next step is the completion of economic integration which, it is proposed, should be achieved by 1992. The ordo-liberal rationality is, it could be contended, deepened in the context of the single market project. As noted, notwithstanding the ordo-liberal inspiration behind the Treaty of Rome, a classical liberal rationality survived to the extent that the legal-political constitutions of national jurisdictions offset the economic constitution; the economic constitution was clearly delimited. With the single market project, however, the economic constitution begins to colonise the legal-political constitution within member states.

The gradual constitutionalisation of an ordoliberal rationality can, then, be seen as a practical example of *the reversal* in the function of state and market identified by Foucault and discussed in Chapter 1. Of course, this picture of the inexorable expansion and deepening of an ordoliberal rationality is a partial one as will be discussed below and in subsequent chapters with reference to a *never-quite-displaced* legal cosmopolitan rationality. Nevertheless, to a large extent it seems that a neofunctionalist logic played a performative role in the expansion of market rationalities and the constitutionalisation of ordoliberal ideas at European level.

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39 European Commission, "Completing the Internal Market: White Paper from the Commission to the European Council " (Milan: 28-29 June 1985).

## *Ordoliberal Rationalities II: Monetary Union*

Such a process is furthered with monetary union. This project was mooted in the SEA, but the idea had been around almost as long as the EEC itself.<sup>40</sup> Its culmination in the Maastricht treaty and, ultimately, its realisation in the single currency extended the competences of European level government, which adopted a monetarist agenda that broadly coheres with the austerity principles favoured by ordoliberals (see Chapter 1) and in German monetary policy. Indeed, for many, monetary union is the culmination of an economic constitution which coheres with an ordoliberal agenda.<sup>41</sup> As with the Rome treaty, German economists/technicians played a significant role in the design of monetary policy embodied in the Maastricht treaty.<sup>42</sup> Reaching a very similar conclusion, but from a more critical point of view, Stephen Gill conceives of monetary union as a further step in the constitutionalisation of neo-liberal ideas or what he calls a 'new constitutionalism'.

As he says,

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40 Although the manner in which it was conceived has changed significantly over time and depending on its advocates as reflected in the discussion of French policy in Chapter 3.

41 Although it ought to be noted that this interpretation is challenged by Bidow, who does not understand the central tenets of German central bank independence and monetary stability to have originated in an ordoliberal theory, even as they manifest in the German context and Bundesbank. See, Jorg Bidow, "Investigating the Intellectual Origins of Euroland's Macroeconomic Policy Regime: Central Banking Institutions and Traditions in West Germany after the War," (Annandale-on-Hudson, NY The Levy Economics Institute, Working Paper 406, 2004). However, I would argue that such an analysis relies on a narrow reading of particular ordoliberal thinkers and understates the inherent ambiguities and tensions within ordoliberal thought, which is oriented towards free markets, but also – necessarily - designates an important role for government within which price stability is potentially important. Certainly this is Foucault's interpretation of ordoliberal thought (see Chapter 1). Another way of putting this, is that in the German context, the notion of 'organised capitalism' is, historically, considered as an intrinsic part of a competitive economy rather than as its antithesis and price stability can be understood in this context. On this, see, for example, Allen, "Ordo-Liberalism Trumps Keynesianism: Economic Policy in the Federal Republic of Germany".

42 Maes, "On the Origins of the Franco-German EMU Controversies." p.36

[N]ew constitutionalist initiatives are designed to lessen short-run political pressures on the formulation of economic policy by implicitly redefining the boundaries of the 'economic' and the 'political'. Such boundaries police the limits of the possible in the making of economic policy. Legal or administrative enforcement is required, of course, since the power of normalizing discourse or ideology is not enough to ensure compliance with the orthodoxy.<sup>43</sup>

This could almost have been written by an ordo-liberal, although the redefinition of and juridical policing of the borders between the political and economic would be conceived in favourable terms for all the reasons enunciated above and in Chapter 1; indeed, Gill's critical 'new constitutionalism' is almost synonymous with the ordos much celebrated economic constitution.

One concrete context in which the 'redefinition' and 'enforcement' of an economic constitution enunciated by Gill can be seen to have taken place is with the Maastricht decision of the German Constitutional Court. As Joerges and Rödl note, while this decision has, from certain perspectives, been understood as re-asserting in Schmittian fashion the judicial and legislative autonomy of a member state in the face of the erosion of competencies by the EU (see below for more on this), it at once legitimates the process of 'new' or economic constitutionalism. As they put it:

True the [Court] calls it a constitutional must that the German Parliament retains "essential" competencies. But then the Court takes its ordoliberal turn: *Economic integration is perceived to be an apolitical phenomenon*

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43 Stephen Gill, "European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe," *New Political Economy* 3, no. 1 (1998).



occurring autonomously to states, and European Monetary Union is granted functional legitimacy based upon the commitment to a *politically-neutral notion* of price stability. Economic integration, in this reading, would not be subject to on-going constitutional review for its democratic qualities. Europe may hence become a "*market without a state*" and the so-called "masters of the Treaties" [member states] would be left as "states without markets."<sup>44</sup>

We see here the promotion of the ordoliberal 'reversal' in practice at the European level; the promotion of Europe as a 'market without a state' and its implications for member states. While the German constitutional court clearly promotes the importance of the nation-state rooted in a democratic legal rationality of government - a distinctly intergovernmental or sovereignist rationality - according to Joerges and Rödl's analysis it seems clear that such a rationality has become at least partially colonised by an ordoliberal rationality of 'economic constitution'; in other words, a *new* constitutionalism. It demonstrates the manner in which even a defender of national sovereignty such as the German constitutional court became socialised into the ordoliberal rationality even as it sought to promote the supremacy of the German Parliament.

While European institutions had clear motives for adopting a market rationality and seeking the pursuit of new constitutionalist agendas, it may be more surprising that national governments and judiciaries permitted the emergence of an economic constitution driven by big business via European government and the ECJ, which culminated in their support for the SEA and, thereafter, Maastricht and monetary union. However, as soon as one or two member states supported the ECJ's primacy - perhaps

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44 Joerges and Rödl, "'Social Market Economy' as Europe's Social Model?." p.7.

due to ideological conviction, more pragmatic concerns about capital flight out of Europe, a simple respect for the judiciary or a blindness regarding the *essentially political* implications of judicial activism - others followed, concerned about their own competitiveness. Moreover, the use of unanimity in much decision making actually makes it difficult for member states to overturn a legal constitutionalisation given that only one member state needs to agree with a particular judgement for it to remain enforceable.

That said, notwithstanding support for the single market, there remains significant national-level resistance to such a project associated with a legal rationality of government, as manifest in European government itself, which is discussed primarily with reference to the case of French policy for/ towards EU(rope) in Part II. For now, it ought to be noted that the economic constitution does not imply the absence of social policy at the EU(ropean) level of government. Recall from Chapter 1 that an ordo-liberal rationality permitted a space for government which has strong parallels with the contemporary understanding of EU(rope) as a 'regulatory state'. Furthermore, social policy - as *social regulation* - is not precluded as long as such policy is assessed in terms of its market distorting function. Thus, the fact that the EU and ECJ in particular has become a site of social regulation in relation to such questions as the environment, equal opportunities, health and safety and employment rights is not necessarily inconsistent with the rationality of the economic constitution.<sup>45</sup> Indeed, the promotion of an ordo (or

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<sup>45</sup> For a counter argument, which claims that the economic constitution is eroded by the SEA and Maastricht, see Manfred E. Streit and Werner Mussler, "The Economic Constitution of the European Community: From Rome to Maastricht," *Constitutional Political Economy* 5, no. 3 (1994). See below for more on this.

even, US neo-) liberal social policy may have important consequences for social policy and solidarity more generally as discussed briefly in the following section and in some detail in Chapter 6.

### ***An Inexorable Logic?: Market Subjects 'all the way up and all the way down'***

The inexorable market-functionalist logic witnessed in the context of the Commission White Paper on the Internal Market is not a recent phenomenon. It can be found in the thought of market cosmopolitan activists and intellectuals since the early twentieth century. For example, as early as 1918 Giovanni Agnelli, the founder of Fiat, and Attilo Cabiati, an Italian economist, foreshadowed a hyperglobalism logic:

[W]hile the superb inventions of steam applied to land and sea transport, of electricity as motive power, of the telegraph and telephone had by then cancelled distance and made the world one single large centre and international market, little men strove with all their might to cancel the immense benefits of the big discoveries, artificially creating isolated markets and small production and consumption centres... Only a federal Europe will be able to give us *a more economic realization* of the division of labour, with the elimination of all customs barriers.<sup>46</sup>

The *nature* of the market is at the centre of this logic, driving integration despite the best efforts of 'little men'. The logic runs as follows: new technologies shrink space and time and require an expansion in the scalar levels of the market and its government, while any barriers or obstacles to this expansion act as an *unnatural* brake on economic performance

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46 G Agnelli and A Cabiati, "Federazione Europea O Lega Delle Nazioni?," *The Federalist* 32 (1989 (1918)). Cit. Weigall and Stirk, eds., *The Origins and Development of the European Community*. p.7.

and prosperity.<sup>47</sup> From the perspective of a pragmatic big business, the European level is seen as the appropriate domain for this new market, largely because it has the institutional capacity to become such a space. Such a vision prompted the activism of the ERT in promoting, often via the ECJ, the single market project, highlighted above.

However, further technological development also means that the scalar possibilities of the market are no longer logically restricted to Europe and, via other institutional settings, such as the WTO, market cosmopolitan ideas are promoted on a global scale; *inter alia*, pressures on external tariffs mount and capital controls are eroded. On the one hand then, this global dimension would logically render Europe increasingly obsolete; why should *European* and not *global* government be the optimal site for the oversight and promotion of a market rationality? In this respect, it is interesting to note that not all ordoliberals agreed with the project of European economic integration. As Maes says, "Erhard [see Chapter 1], the economics minister, was against the European common market" precisely because "[h]e feared that a European customs union would hinder a world-wide liberalisation of trade."<sup>48</sup> Such an assertion coheres with Millward's abovementioned notion that European protectionists were also supporters of customs union.

On the other hand, Europe becomes an ever more important governing space for the promotion of this global market rationality. The global dimension, which is, by

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47 Mattli, *The Logic of Regional Integration : Europe and Beyond*. p.77.

48 Maes, "On the Origins of the Franco-German EMU Controversies." p.26.

definition, central to market cosmopolitan thought, places further pressures on legal cosmopolitan rationalities and favours the argument for market cosmopolitan rationalities within European member states and at the European level of government. Indeed, according to a hyperglobalism perspective (and, indeed, some Marxist accounts, including Gill's neo-Gramscianism), the promotion of such governing rationalities at a global level inexorably leads to the further and deeper embedding of such rationalities at multiple levels of government.

This identity is not only fostered in relation to the rest of the world, but also internally by offering up Europe as the most appropriate and, increasingly, self-evident governing entity - due, *inter alia*, to its relative size vis-à-vis its rivals and its institutional development to date - to handle and reap the greatest rewards in the context of a *global economy* or, in more recent times, *globalisation*.<sup>49</sup> While European government is central in defining the economic playing field in global terms and, to a large extent, becomes complicit in the very globalisation that it cites, it should also be noted that European government is also, to a large extent itself *governed*. In the Foucauldian sense, its *conduct is conducted* by big business and a centre-right majority of member states in the mid-1980s.<sup>50</sup> As van Apeldoorn notes, there may have been a shift in the agenda of big business as embodied in the ERT from a preoccupation with the internal market that advocated protecting a European 'home' market as a means to enhancing

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49 Ben Rosamond, "Discourses of Globalization and the Social Construction of European Identities," *Journal of European Public Policy* 6, no. 4 (1999). Colin Hay and Ben Rosamond, "Globalization, European Integration and the Discursive Construction of Economic Imperatives," *Journal of European Public Policy* 9, no. 2 (2002).

50 Manow, Schäfer, and Zorn, "European Social Policy and Europe's Party-Political Center of Gravity, 1957–2003." p.24.

competitiveness, towards a neo-liberal conception of competitiveness in terms of the removal of all 'barriers' and global *laissez faire*.<sup>51</sup> What van Apeldoorn and Horn call the 'marketisation and transnationalisation of corporate control' – the restraints imposed by deregulated capital markets over corporate governance or, more abstractly, the increase in the power of 'money capital' relative to 'productive capital' – may have been significant in this shift to neo-liberal rationalities among European corporate elites.<sup>52</sup> Calls for flexibility of labour markets and concomitant deregulation may thus emanate from the very same European firms that once called for European government protectionism (and, even before that, were possibly engaged in cartelisation and price-fixing of the sort the ECSC sought to outlaw).

More generally, it could be said that European government is *conducted* by a more vague hegemony of neo-liberal ideas emanating, in particular, from the US. As already highlighted, the US has directly influenced German and European government since the Second World War via, *inter alia*, the Marshall plan, but this influence manifests in a host of more indirect ways, such as via various important transnational 'epistemic communities' in the context of transnational organisations such as the Bretton Woods institutions or the OECD.<sup>53</sup> In particular, the prominence of a Chicago school monetarism from the 1970s clearly left its mark in European policy, further radicalising many of the ordoliberal rationalities prevalent in that context – and supporting such principles as

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51 Bastiaan van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration*, Ripe Series in Global Political Economy (Routledge, 2002).

52 Bastiaan van Apeldoorn and Laura Horn, "The Marketisation of European Corporate Control: A Critical Political Economy Perspective," *New Political Economy* 12 (2007).

53 Apeldoorn, *Transnational Capitalism and the Struggle over European Integration*. pp.117-130 See also Maes, "On the Origins of the Franco-German EMU Controversies." p.31.

central bank independence - and opposing Keynesianism to the extent that this had co-existed with ordoliberalism to that point in the European context. This is not to say that the neo-liberal globalisation prophecy was accepted as an inexorable narrative or teleological history by all the actors in the game. However, its perceived self-fulfilment has arguably come to represent a contingent structural constraint on government at multiple scalar levels. Indeed, notwithstanding important instances of resistance – discussed in later chapters - the ‘common trajectory’ in Europe since the 1980s has been towards neo-liberal restructuring and the retrenchment of welfare states.<sup>54</sup>

Whatever the various factors at play, the contextualisation of Europe in these terms leads to the extension of the notion of competition. Concretely, if the US has established a single internal market which pushes down costs and increases productivity, then at a global level where capital flows increasingly freely, European market actors will not be able to compete unless European government does something similar. Correspondingly, the emphasis for big business shifts from the anti-competitive practices of its competitors, to the perceived anti-competitive practices of the various national jurisdictions within which it operates. Governments become aware that if they fail to respond to these calls – to ‘modernise’ – then these European market actors will soon become American market actors, with obvious economic and, ultimately, social consequences.

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54 Colin Hay, "Common Trajectories, Variable Paces, Divergent Outcomes? Models of European Capitalism under Conditions of Complex Economic Interdependence," *Review of International Political Economy* 11, no. 2 (2004).

Competition is no longer considered then as a principle which ought to govern only market relations among private firms within the EEC. It now also has a spatial implication, governing relations among governing 'areas', such as 'Europe' and its economic rivals. However, according to the same logic, the establishment and expansion of this single market requires that competition is extended as a governing principle not only to a European area, but also to governing 'areas' or sites below the European level. Indeed, the single market's success involves, "ensuring that the market is flexible so that resources, both of people and materials, and of capital and investment, flow into the areas of greatest economic advantage."<sup>55</sup> Practically then, European government enjoins national government to itself become economical and competitive in a way that it had previously not been; states are disciplined into actively marketing themselves as the sites of 'greatest economic advantage' and, correspondingly, least economic resistance.

Competitiveness becomes a guiding virtue not only for enterprises, but also for these multi-levelled governed spaces and for individuals within these spaces. While economic competition among states has historically been bound up with at least the residue of a mercantilist, imperialist and/or militaristic rationality, with the pacification of Europe and the opening (or, better, *creation*) of ever new markets, the governing role of the state in fostering the competitiveness of its national space is significantly transformed. Both Europe and its member states are (wilfully) re-rendered by European governing actors as

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<sup>55</sup> Commission, "Completing the Internal Market: White Paper from the Commission to the European Council".



competitive entities or spaces in a relatively open global economy. As Joerges says, with the Delors white paper of 1985,

The attention shifted from market failures to regulatory failures, from the control of the anti-competitive practices of private actors to anti-competitive regulation and state aid. And from such premises, the plea for de-regulation and privatization followed with a compelling logic [...] The turn from Walter Eucken [ordoliberalism and the social market economy] to Friedrich von Hayek [neo-liberalism], and, in particular, the shift of emphasis from private to public distortions of competition affects the role of the state and state institutions.<sup>56</sup>

The shift from the Treaty of Rome to the single market project – via ECJ, big business, Commission and some member state activism – can be read, in line with Joerges, as a shift from a German to an American neo-liberalism of the sort discussed in Chapter 1. This does not mean a diminishing role for government either at the European or national level; Europe does not become a unitary economic space and the ‘European economy’ or ‘European competitiveness’ do not emerge as self-evident notions through governmental inactivity, but through an active process of discursive framing, the framing of what constitutes responsible action. The public policy framing of Europe as an economic space in a global economy creates the opportunities and incentives for private actors to engage in such a space and those actors, in turn, push for the *realisation* of such a space in the ways described.<sup>57</sup> In this context, the discursive deployment of ‘barriers’ provides an important reference point for government action and private actor lobbying: “[a]ll those reports, conferences, inquiries and statistics which will make the European economy

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<sup>56</sup> Joerges, "What Is Left of the European Economic Constitution? A Melancholic Eulogy." pp.18-19.

<sup>57</sup> See also, Rosamond, "Discourses of Globalization and the Social Construction of European Identities."

knowable from the perspective of its barriers forms a positivity.... Within this discourse barriers tend to multiply.”<sup>58</sup>

Indeed, in Europe qua market Europe, barriers are a source not of security, but of insecurity. Security is no longer that which the state provides via military strength, state aid or other redistributive welfare policies, but that which the state potentially undermines through interfering in the market and limiting competitive potential and Europe guarantees by de-legitimising and, to some extent, outlawing, such interference. A corollary of this is that in accord with a tradition of disciplining practices and biopolitics referred to in Chapter 1, those subjectivities – firms, regions, states, individuals and so on - which do not confer to the image of enterprise are assimilated or excluded in various ways. So, for example, as noted, big business, the Commission and ECJ uphold the economic constitution in the face of states which flout its rules and this requires substantial re-regulation; member state agencies patrol a multiplicity of physical borders for ‘uneconomical’ economic migrants (see Chapter 4); while government at various levels, industries, schools and a host of other governing sites promote and validate a particular ‘subject of interest’ – ‘the entrepreneur’ - among populations (as discussed in Chapter 1 and in greater detail in Chapter 6).

This extension of market subjects – *all the way up and all the way down* - and its governing implications are largely accepted and promoted by the EU. In particular, by the Commission, as reflected in its 1993 White Paper on *Growth, Competitiveness, Employment*

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<sup>58</sup> Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*. p.61.

and the Lisbon strategy of 2000, whose ambition is that Europe should, by 2010, become “the most competitive knowledge-based economy in the world”. I discuss in greater detail the Lisbon strategy (as well as its successor ‘Europe 2020’) in Part III of the thesis; suffice to say here that it is a strategy which furthers the shift towards an American neo-liberal governing rationality and a concomitant generalisation and expansion of market subjectivities.<sup>59</sup>

### **Towards a Legal Cosmopolitan Resistance**

While, as noted repeatedly, important political contingencies were involved in the establishment and promotion of market rationalities at the heart of the European project, I have argued that the very telling and re-telling of a linear, logical narrative of the deepening and expansion of the market has been of performative import. In other words, the market has been a self-fulfilling prophecy in the context of European government, ever since it was championed as that which might create functional interdependencies among formerly hostile nations. Relatedly, we might reflect that globalisation – in its economic, technological and social variations – is as much the result of, as it is an explanation for, the rise of liberal or neo-liberal economic policies. Similarly, it could be claimed that a common European market is not that which requires liberal policies, but that which is created by such policies. Edouard Herriot, a former French Premier and a

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<sup>59</sup> For a neo-Gramscian statement on this, see, for example: Bastiaan van Apeldoorn, “The Contradictions of ‘Embedded Neoliberalism’ and Europe’s Multi-Level Legitimacy Crisis: The European Project and Its Limits,” in *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon*, ed. Bastiaan van Apeldoorn, Jan Drahokoupil, and Laura Horn (Basingstoke [England]; New York: Palgrave Macmillan, 2009).

keen advocate of European integration, stated in 1930 that integration was “rendered necessary by the *laws of economic evolution* ... and by the necessity of defending *the European market*”.<sup>60</sup> The tautology that European market integration was required in order to protect *the European market* is every bit as present in contemporary rationalities of European integration and globalisation.

And yet, from a Foucauldian perspective, the power of a supranational logic of convergence around neo-liberal knowledges necessarily implies a resistance to such logics from alternative power/knowledge nexuses, given that any governing power – ‘the conduct of conduct’ – *requires* a space of choice, of responsibility, essentially a space of freedom (see Introduction and Chapter 1). While some neo-Marxist perspectives on European integration – and indeed, some ‘hyperglobalist’ theses - have perceived the power of a neo-liberal logic of capital as all-constraining, we concur here with Foucault’s assertion that power only acts upon subjects to the extent that they are free to act. Recall that, for Foucault, actions which constrain absolutely are characterized as domination, whereas, “at the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom.”<sup>61</sup>

Concretely, even as a neo-liberal market cosmopolitan rationality can be regarded as prevalent, both globally and within European level government, a legal cosmopolitan rationality has always exerted itself in European politics at a number of different levels

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<sup>60</sup> Edouard Herriot, *The United States of Europe* (London: Harrop, 1930). p.287. cit. Weigall and Stirk, eds., *The Origins and Development of the European Community*. p.16.

<sup>61</sup> Foucault, “The Subject and Power.”

and in a variety of ways. Contrary to a market cosmopolitan rationality such legal rationalities are imbued with a sense that 'barriers' can, do and, indeed, did, offer security. For sure, some such rationalities can be inherently anti-cosmopolitan; for some the very concept of Europe is regarded as anti-democratic and anti-social and undermines the legal constitutional order of the nation-state, which is to be normatively respected. As already intimated above, this legal rationality was reflected in certain nationalist resistance to the European project as it emerged with the *dirigiste*-liberal Schuman-Monnet plan. We might also note in this context the significance of Gaullism from the mid-1960s and, in particular, France's 'empty chair' policy and the eventual Luxembourg compromise. This can be understood as a backlash against Hallstein's aggressive supranational-cum-ordoliberal manoeuvrings and clearly left its legacy in terms of subsequent state opt-outs and the reality of a multi-speed Europe.<sup>62</sup>

Similarly, the German Constitutional Court 'Maastricht decision', was not, as implied above, solely an assertion of an ordo-liberal logic; it can also, in accordance with Weiler, be interpreted as a 'no-demos' decision on Europe. In other words, the Court asserted a delimited (economic) role for the European level of government *precisely because* a more substantive post-national order rooted in a *clearly constituted* demos is understood to be only possible at the national level.<sup>63</sup> Suffice to say here that contemporaneously, states have repeatedly asserted their sovereignty in the face of supranational government as

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62 Ironically, of course, the exigencies of unanimity might also have strengthened the powers of the ECJ to 'constitutionalise' European law, as mentioned above.

63 Joseph Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999). See, in particular, the essay, 'The State 'über alles': Demos, Telos and the German Maastricht decision'

reflected in the tortuous negotiations and ratification processes associated with numerous treaties (most recently, the Lisbon treaty) and in substantial and oftentimes successful resistance to the dictats associated with neo-liberal or market Europe (discussed in some detail in Chapter 3 with reference to contemporary French policy).<sup>64</sup>

For some, it has not been Europe *per se* which is responsible for these democratic and social deficits; rather, it is the erosion of a domestically achieved social security – the imaginary of social contract discussed in Chapter 1 - that is to be lamented in the modern European project. Such legal rationalities are not inherently anti-cosmopolitan; indeed, a legal *cosmopolitan* rationality is, as noted in this chapter, to be found in early propositions for greater European unity and from this perspective, a legal – and not market - cosmopolitan rationality was to form the basis for European unity. For federalist legal cosmopolitans it was the granting of transnational rights and the establishment of a democratic political constitution at the European level which was to provide for European integration in the form of the nascent Council of Europe. And within this vision many foresaw the establishment of a substantive social Europe.

This is not, as this chapter has highlighted, the direction that European integration would take; instead we have witnessed the gradual *constitutionalisation* or *Europeanisation* of market cosmopolitan rationalities and the failure to achieve a substantive political constitution at European level which extends far beyond market (re-)regulatory

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<sup>64</sup> See, for example, Kenneth Dyson, "Benign or Malevolent Leviathan? Social Democratic Governments in a Neo-Liberal Euro Area," *Political Quarterly* 70, no. 2 (1999).

measures. Nevertheless, it would be a simplification to suggest that this legal cosmopolitan perspective has not impacted on the workings of the transnational politico-juridical system. For example, notwithstanding the foregoing discussion of the ECJ, its jurisprudence has not been unambiguously neo-liberal.<sup>65</sup> In particular, it is important to note that the ECJ has been structurally constrained not only by an economic constitution, but also by a legal cosmopolitan rationality emanating from various institutional quarters.<sup>66</sup> For instance, in order to off-set a potential backlash against the common market project in general, the ECJ has repeatedly aligned its interpretation of an economic constitution with the principles enshrined in the ECHR. With the recently ratified Lisbon Treaty, the way has been opened for the accession of the EU to the ECHR. Moreover, the ECJ has acknowledged in certain jurisprudence, that these principles themselves emerge from - and find different interpretations within - the sovereign constitutional traditions of member states which it should, at least to some degree, attempt to respect.<sup>67</sup> In short, the Court is respectful on the one hand of a legal cosmopolitan institution such as the ECHR and, more loosely, what in Part II I call a *European* (or, more evocatively, a 'statist') cosmopolitan rationality of government. On the other hand, it is also respectful of, what in Part III, I term a *cosmopolitan* Europe (or 'pluralist') rationality of government to the extent that it acknowledges different national

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65 See, for instance, Daniel Wincott, "Containing (Social) Justice? Rights, EU Law and the Recasting of Europe's 'Social Bargains'," in *National Europe Centre Paper No.87* (2003).

66 Wincott, "A Community of Law? 'European' Law and Judicial Politics: The Court of Justice and Beyond."

67 Member state resistance to ECJ supremacy has clearly forced its hand in this regard. For instance, in the so-called Solange cases in the 1970s and 1980s, the German constitutional court refused to accept ECJ supremacy to the extent that it failed to protect fundamental rights. Sabel et al. highlight cases where the ECJ has accepted the right of member states to interpret fundamental freedoms in a manner that may have adverse consequences for the functioning of the internal market. They refer, for example, to the Schmidberger and Omega Spielhallen cases. Charles F. Sabel and Oliver Gerstenberg, "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Co-Ordinate Constitutional Order," (Unpublished work).

legal systems.<sup>68</sup> It can be said then that the juridical interpretation of the treaties reflect aspects of a legalistic or social-contractarian *cosmopolitan* rationality, which is hardly surprising given their necessary interactions with the self-appointed 'masters of the treaties'.<sup>69</sup>

From this perspective, historical materialist scholars of integration, such as Gill, may overstate the structural significance of market rationalities when they talk of 'new constitutionalism', as, indeed, I have probably done throughout much of this chapter.<sup>70</sup> Indeed, in focusing on the core aspects of Europe's integration – its market integration or what, prior to the Lisbon treaty, was known in institutional discourses as the first or community pillar – I have to some extent neglected the continued presence of a legal cosmopolitan government. In reality, the European level of government has repeatedly deferred to a legal cosmopolitan rationality in order to remain an important actor in the face of the potential (re)-assertion of legal *sovereign* rationalities by the member states, as mentioned above. This is noticeable more generally in successful resistance to the market logic at the level of the treaties themselves, manifest, *inter alia*, in the establishment of intergovernmental pillars at Maastricht where *justice* and *home* affairs and a common foreign and *security* policy formally found their place on the EU governmental agenda. These pillars set out - albeit with limited success given their intergovernmental structure - to establish sovereign rationalities of government at the European level.

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68 Concretely, in recent years the ECJ may have been responding to the concerns of both increasingly sceptical EU citizens and member states which at Maastricht had shown a desire to 'clip its wings'. See Wincott, "A Community of Law? 'European' Law and Judicial Politics: The Court of Justice and Beyond." p12

69 Note, for instance, Article 6 TEU. (see Chapter 3 for further discussion).

70 For a critique see, Owen Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'Social Europe' and 'Soft' Governance," *New Political Economy* 13, no. 4 (2008).



From a neo-liberal perspective, and contrary to the above analysis, Streit and Mussler argued in 1995, that both the SEA and the Maastricht treaty actually represent a *dilution* of the economic constitution established with the EEC treaty. They claim that these treaties expand the possibilities for interventionist policies by the Communities (particularly Commission) which extend beyond the ordo-liberal goal of assuring undistorted competition. For instance, it is noted that the EU Treaty (Maastricht) grants a role to the Community to ensure the competitiveness of community industry that is commensurate with an interventionist (potentially protectionist) industrial policy at the European level.<sup>71</sup> While this chapter has hopefully demonstrated that *in practice*, contrary to their fears, policy in this area has been conducted in accordance with a neo-liberal rationality (and corresponding understanding of globalisation), it is certainly important to note that the treaties are not a pure reflection of such a rationality and legal cosmopolitan rationalities are present throughout them. In this regard we might cite, in particular, the Charter of Fundamental Rights, which, formalises the abovementioned *de facto* recognition of transnational fundamental rights by the ECJ and includes provisions relating to social and economic rights.<sup>72</sup>

The Charter is not the only place where social and economic rights have been recognised. A Council Resolution of 1989 highlighted that, "combating social exclusion may be

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71 Streit and Mussler, "The Economic Constitution of the European Community: From Rome to Maastricht."

72 If any lingering doubt regarding its legal status remained, the Treaty of Lisbon explicitly renders the Charter binding (except in the cases of those states securing opt-outs: UK, Poland and Czech Republic).

regarded as an important part of the social dimension of the internal market".<sup>73</sup> As noted in later chapters the Delors Commission Presidency was active in championing a social agenda at EU level, although it wasn't until 1997 that an 'Agreement on Social Policy' found its way into the Amsterdam Treaty following UK ratification. As discussed at length in Part III, co-ordination on social policy has been based on soft law (the OMC) – exchange of best practice and so-forth – and the impact of European level government in this domain should certainly not be over-stated. Nevertheless, the presence of a policy agenda at European level which implicitly recognises the limits of an agenda solely oriented to economic growth demonstrates that there is at least an attempt at the European level to establish some sort of social contract within member states, even as this very same governmental level is sometimes corrosive of that very same national level contract. Such a concern reflects, of course, the presence of a far more substantive concern with questions of social justice at a domestic level (discussed with reference to French policy in Chapter 3).

That said, and as demonstrated throughout this chapter in sometimes hyperbolic manner, ordoliberal and neoliberal rationalities have had and continue to have a central constitutive role in European level government and have, I would maintain, to a large extent set the parameters for a residual legal cosmopolitan rationality.<sup>74</sup> This claim is discussed in greater detail in Chapter 6 with reference to the Lisbon agenda and its

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73 European Council, "Resolution of the Council and of the Ministers for Social Affairs," (Brussels: 29 September 1989).

74 In later chapters (particularly in chapter 6, with reference to the Lisbon Agenda), I discuss the ways in which legal cosmopolitan discourses – notions of citizenship, social security, social Europe and so forth – are to some extent de-limited or re-defined in the face of market cosmopolitan logics.

conception of social policy. At a profound level, the predominance of a market cosmopolitan rationality would seem to be a consequence of the prior prevalence of the 'subject of interest' in domestic governing practices – the emergence of a utilitarian classical liberalism and, in particular, the ordoliberal conceptual *reversal* which increasingly made possible the state's subordination to market - as I discussed with reference to Foucault's genealogy in Chapter 1.

## **Conclusion**

In this chapter, I have sketched some of the ways in which a set of knowledges associated with liberal government described in Chapter 1 have constituted, established themselves, and evolved within, European level government. I have highlighted, in particular, the ways in which a market cosmopolitan rationality of government has been constitutive of and informed European level government, to some extent at the expense of a legal cosmopolitan rationality both at European and various domestic levels of government. This government's tasks have been centred on the imagining, promotion and ongoing re-conceptualisation and re-contextualisation, of a *European* market space and its various subjects. The shifts in and development of a market cosmopolitan form of government at the European level are presented episodically in terms of a shift from a classical to a German-inspired neo- (or ordo) liberalism to a US-inspired neo-liberalism, which were discussed in Chapter 1. The ECSC is constituted by and promotes a *dirigiste* liberal-market government and even the Rome treaty - while promoting an ordo-liberal economic constitution - is offset in practice by the legal-political constitutional

settlements within nation-states and is not primarily designed to displace these. Nevertheless, a combination of ECJ, big business and Commission activism - and associated ideological shifts in certain member state governments - leads to an ordo-liberal *reversal*: the promotion of a single market project which permits the displacement of legal-political constitutional orders by the post-national ordo-liberal economic constitution. Thereafter, attention turns to the generalisation of market above and below the European level; it is *globalised* as governing rationality. The final part of this chapter briefly noted the extant resistance to this market logic from a legal cosmopolitan rationality. In accordance with the Foucauldian approach adopted it was highlighted that such a rationality, which lay at the heart of early post-war visualisations of European unity, has never been entirely displaced by a market cosmopolitan rationality in European government.

In these ways, I demonstrate the limitations of a reading of liberal internationalism as an essentially pacifying unfolding towards an 'end of history' which underpins many of those contemporary international political theory and European studies literatures highlighted in Introduction. To recap, such literatures often fail to reflect on the contingent conditions of possibility entailed in their ostensibly apolitical normative and positive assertions about EU(rope) and cosmopolitan government. So, for instance, Moravcsik's claim that his liberal theory of international relations is 'non-ideological' - and his application of such a theory to European integration - is oxymoronic; it fails to recognise its own indebtedness to a neo-liberal institutionalism that is itself largely the

product of the spatial extension of the neo-liberal thought and practice considered in this and the previous chapter.<sup>75</sup> Moreover, even when such theories acknowledge their normative orientation, they fail to fully consider the ethico-political or subjectifying effects of their underlying assumptions. For instance, while Majone's theory of a regulatory EU(rope) is more candid in its normative orientation, it fails to reflexively consider the subjectifying implications of a restrictive market cosmopolitan ontology.<sup>76</sup> This and the previous chapter has emphasised that economic subjectivities – ranging from Europe itself, to industries, firms and individuals – are not some natural entity that has been discovered, but identities that have to be constantly (re)-made or, to use Foucault's term, *conducted*, at the expense of alternative ways of being. Finally, in accord with Foucault's acknowledgment of the resistance immanent in liberal government – or *power* – the genealogies in these chapters have acknowledged the potential for resistance that lies at the heart of a liberal cosmopolitan government of the sort described. Thus, it does not fully accept the rather teleological prognoses of either certain liberal (neo)-functionalist accounts of globalisation and Europeanisation or certain historical materialist accounts – such as Gill's neo-Gramscianism – which seem to underplay the possibilities of resisting an economic constitutionalisation or, indeed, the extant evidence of such a resistance present within EU(rope).<sup>77</sup> The genealogy offered in this part of the thesis has, then, illuminated the conditions of possibility of a cosmopolitan government, its associated restrictive ontologies and the potential for resistance to those market

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75 Moravcsik, *The Choice for Europe : Social Purpose and State Power from Messina to Maastricht*, ———, "Taking Preferences Seriously: A Liberal Theory of International Politics."

76 Majone, *Regulating Europe*. For a compelling critique, see Wincott, "European Political Development, Regulatory Governance, and the European Social Model: The Challenge of Substantive Legitimacy."

77 For a fuller account, see, Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'Social Europe' and 'Soft' Governance."

rationalities that lie at the heart of the constitution of post-national government in Europe.

The remainder of the thesis will assess in greater detail the ways in which legal cosmopolitan government has sought to resist the prevalent market cosmopolitan rationality. Indeed, the following chapters describe and critically engage with a range of ostensibly *ethical* cosmopolitan responses to the perceived *social* and *democratic* deficits attributable to the prevalence of a market cosmopolitan rationality in the contemporary EU at both the level of theory and practice. While it will become clear that they are related, the two remaining parts of the thesis are organised in terms of two specific rationalities of legal cosmopolitan government: the 'statist-legal' and 'deliberative-legal' rationalities highlighted in Introduction. The purpose, it is worth restating, is not primarily to endorse either of these legal cosmopolitan *ethics* or *forms of resistance*. Rather, as with a market cosmopolitan rationality, I am interested in considering the conditions of (im)possibility of these alternative rationalities and considering the ways in which each of these frame subjectivities, or ways of being and thinking.

**PART II:**

**LEGAL COSMOPOLITAN GOVERNMENT I:**

**THE ETHICS OF A *EUROPEAN* COSMOPOLITANISM**

[T]he challenge before us is not to invent anything but to conserve the great democratic achievements of the European nation-state, beyond its own limits.

*Jürgen Habermas*<sup>1</sup>

Petrarch asked if there was anything more to history than the praise of Rome. And we ask – and this is no doubt typical of our historical consciousness ...: 'Is there anything more to history than the call for revolution, and the fear of revolution?' And let me simply add this question: 'And *what if Rome once more conquered the revolution?*'

*Michel Foucault*<sup>2</sup>

The problem with the French is that they have no word for entrepreneur.

*George W. Bush*<sup>3</sup>

As emphasised at the end of Part I, the imaginary of social-contract and of associated nation-state has not disappeared even at the European level of government, which was, as discussed, constituted by the imaginary of the market and its irenic possibilities. For

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1 Jürgen Habermas, "Why Europe Needs a Constitution," *New Left Review* 11 (2001).

2 Foucault, "*Society Must Be Defended*" *Lectures at the Collège De France, 1975-76*. p.84.

3 George W. Bush (allegedly) (2002). A famous and widely reported 'Bushism', it should be noted that it is a contested matter as to whether George Bush actually said this to Tony Blair in 2002.

many, this legal cosmopolitan rationality has in practice not managed to assert itself consistently at the European level of government, which, on the contrary, has eroded the possibility to protect the social democratic achievements of the nation-state even at domestic level. Among those proposing the assertion of a legal cosmopolitan rationality – and associated constitution - at European level is one of Europe's most well-known living philosophers, Jürgen Habermas. As discussed throughout Chapter 3, Habermas believes that a neo-liberal market rationality is corrosive of social and democratic freedoms and therefore argues for a constitutional settlement at the European level and engages in the nurturing of what he calls a 'constitutional patriotism' for EU(rope). Habermas asserts then, the ethical possibilities of social democratic nation-state and seeks to generalise these to European level; he imagines a delimited European cosmopolitanism capable of taming what he calls a market Europe. In Chapter 3, French policy is taken as an exemplary case of this Habermasian promotion of a more social European settlement. French discourses – governmental and popular - have repeatedly championed a more 'social' EU(rope) and an economic patriotism (or protectionism) at the European level. Such discourses therefore offer an illustration of the presence of this Habermasian legal cosmopolitan rationality in extant European politics.

Chapter 4 turns to consider the implications of a *European* legal cosmopolitan rationality of government or a vision that seeks to imagine EU(rope) as nation-state. It demonstrates, in particular, that the reinvention of nation-state involves the reinvention of sovereign violences associated with nation-state. Habermas's desire for a constitutional settlement is problematic because of the lack of a constitutional moment in/for EU(rope); a lack of significant popular will for a social European settlement.



Consequently EU(rope) is thought in terms of a delimited moral geography. Indeed, Habermas's own desire to establish a common identity rooted in a constitutional patriotism requires the invocation of a 'core' or vanguard EU(rope) that excludes a host of others in Eastern Europe and defines itself in opposition to a neo-liberal US. The implications of this European cosmopolitan rationality are again considered in relation to French discourses on EU(ropean) policy. In particular, the French initiative on an 'Immigration Pact for Europe' and French policy discourses towards enlargement are discussed in order to illuminate the ease with which an ostensibly inclusive Habermasian European cosmopolitan ethic can slide into a potentially violent exclusionary politics. Habermas's and French policy's solidarist citizen is conditional on the *sine qua non*, 'society must be defended', as elaborated via a discussion of Foucault's lecture series of this name.

## Chapter 3: Conceiving Legal Cosmopolitan Government I: Europe as 'Social Europe'

### Introduction

One response to the prevalence of market cosmopolitan rationalities in/for EU(rope) has been to assert the continued importance of the nation-state as the domain which has secured something approximating a social contract and a 'subject of right'. Of course, it is not only those on the left - those with an explicit concern with social justice - that promote the continued importance of nation-state. As noted, liberal internationalists (or neo-liberal institutionalists) such as Moravcsik conceive of the state as an empirically and normatively central feature of international relations, although in this case the state is not so much pitched in opposition to a market cosmopolitan rationality so much as the actor that adopts and *benefits* from such a rationality. This is reflected in his intergovernmentalist theory of integration, where the interests of state and the market cosmopolitan orientation of EU(rope) are considered to be largely coterminous rather than conflictual.

In contrast, those concerned with maintaining the redistributive or *social* function of the nation-state, often envisage it in opposition to a market oriented EU(rope). Thus, the nation-state is pitched against Europe by those who are concerned about the crystallisation of an *economic* constitution and the marketisation of various subjectivities

in the EU; this is understood as a constitution which potentially undermines the achievements of the post-war European welfare state. The premise of such arguments is that the nation-state remains the most appropriate – and normatively favourable - context within which to formulate a social-contract. In the context of the politics of European integration many on the left have opposed the European project for such reasons. As mentioned in Chapter 1, at the level of ideal theory, Rawls is among the most famous contemporary theorists to keep faith with the possibilities of the state for justice and individual self-determination (albeit referring to states as ‘peoples’) despite the acknowledgment of such processes as globalisation.<sup>1</sup>

As discussed in the final part of Chapter 2 and throughout this chapter, this valuing of social-contract or constitution that affords social and economic rights as well as political rights is not itself necessarily antithetical to the European project. Substantive legal cosmopolitan rationalities underpinned early dreams of Europe and live on in certain features of post-national government. Such rationalities of government can be considered cosmopolitan, then, when they attempt to revive the capacity for social justice discovered within the nation-state beyond the state. Such rationalities are regarded as ‘statist-legal’ cosmopolitan rationalities inasmuch as they seek to extend certain features of nation-state beyond the nation-state; they are rooted in a methodological and normative nationalism even as they are cosmopolitan in intent. As discussed in Introduction, a number of cosmopolitan democrats might be conceived in such terms. While they would undoubtedly reject the label applied to them herein, the institutions

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<sup>1</sup> Rawls, *The Law of Peoples*

and conceptions of legitimacy that they promote can be associated with the imaginary of nation-state. So, for instance, while Held regards the association of democracy and state as a contingent historical fact that is creaking under contemporary pressures of globalisation, the delimited multi-level legal orders – including at the global level – that he envisages in response, are certainly inspired by and derived from features that evolved within nation-states. Indeed, the legal institutional orders that he envisages arguably require a set of associated delimited public spheres, communities or constituencies if they are to be legitimate.<sup>2</sup>

This is something that Habermas's particular proposals for cosmopolitan democracy would seem to concede more explicitly than does Held.<sup>3</sup> Indeed, unlike Held's more ambitious (and idealistic) proposals, Habermas's more politically grounded interventions focus on the post-national EU(ropean) domain as containing the immanent possibilities for the cosmopolitan democratic principles that he favours. This is, of course, an incomplete cosmopolitanism; in such conceptualisations, the cosmo-polis is the *European* polis. But it is such a spatial and cognitive limitation which, for Habermas, might make possible the establishment of a post-national *political* constitution for Europe and an associated constitutional patriotism capable of challenging what he conceives as a prevalent 'market Europe' and reinventing the virtues of the European welfare state.

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2 Held and Archibugi, *Cosmopolitan Democracy: An Agenda for a New World Order*, Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*.

3 It ought to be noted that Habermas's political philosophy is an implicit influence on Held, who has written about and drawn upon Habermas's philosophy and political theory in his own work. See, for instance, David Held, *Introduction to Critical Theory: Horkheimer to Habermas* (Hutchinson, 1980). Habermas's thought has also influenced a range of international theory, *inter alia*: Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (London: Polity Press, 1998). ———, "Dialogic Politics and the Civilising Process," *Review of International Studies* 31, no. 1 (2005). Thomas Diez and Jill Steans, "A Useful Dialogue? Habermas and International Relations," *Review of International Studies* 31, no. 1 (2005).

Given his particular interest in EU(rope), it is Habermas's brand of 'statist-legal' cosmopolitan government that, above all, forms the object of analysis in this part of the thesis. In this Chapter I focus, in particular, on Habermas's promotion of a substantive political constitution for EU(rope) - that might offset the economic constitution discussed in Part I – and an associated 'constitutional patriotism'.

In order to illustrate the practical implications of this 'statist-legal' cosmopolitan rationality of government which promotes EU(rope) as 'social' nation-state, this chapter and the following will assess French discourses towards EU(rope), which have often tended to envisage and promote EU(rope) in such terms. Indeed, the opposition to market cosmopolitan rationalities expressed in Habermas's work have been played out in many instances of discursive and policy resistance to a neo-liberal economic constitutionalisation from a variety of elite and popular actors in France. This is not to claim that there exists a French political or ideological unity. It is certainly the case that a utilitarian rationality of government has come to dominate within France as in other member states - even as such a rationality is discursively resisted or reluctantly accepted - and this is reflected in its general support for EU(rope) as market cosmopolitan project.<sup>4</sup> Some French agents would, of course, explicitly support neo-liberal rationalities and there are significant divergences among those who oppose what is often regarded as an *anglo-saxon* neo-liberal politics, as there are differences in the extent to which EU(rope) is embraced as potential antidote. Nor is this to claim French 'exceptionalism' vis-à-vis neo-

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4 Donzelot notes how utilitarian calculation in France is rooted in a sociological form of knowledge (Durkheimian) rather than a political economy. It is, nevertheless, according to him, such a rationality that has dominated in French policy even as supporters of a 'sovereign' or social contractarian rationality have offered a constant voice of resistance. Donzelot, "Michel Foucault and Liberal Intelligence." p.126.

liberal EU(rope). The illustration of a European legal cosmopolitan rationality might also have been provided via an alternative archive; through, for example, describing the actions and discourses of a range of alternative agents – governmental and non-governmental, national and trans-national – that have resisted an economic constitutionalism in the EU.<sup>5</sup> Notwithstanding such important disclaimers, I would contend that what Habermas calls a *constitutional patriotism* is particularly strong in France – rooted not only in social democracy, but also a history of centralist *etatism* - and many French actors have sought to promote a similar constitutional settlement or rationality of government at the European level in terms of such discourses as ‘social’ Europe, European *economic government* or even *European protectionism*. Indeed, in accord with Habermas, while Europe *qua* ‘market Europe’ is sometimes virulently critiqued, Europe as such remains important in terms of its possibilities as a shield from globalisation-as-marketisation, at least for a majority of French elites and citizens. Such an approach is encapsulated in the words of former President Mitterand - *tout se rejoint, notre patrie, notre Europe, l’Europe notre patrie*.<sup>6</sup>

In accordance with the theoretical and empirical elements enunciated above, the chapter proceeds in two main sections. The first begins with a discussion of Habermas’s underlying ontology – his ‘discourse ethic’ – and discusses his move from this theoretical point to his aforementioned critique of a market cosmopolitan Europe and his promotion of a political constitution and associated constitutional patriotism as its counterweight.

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5 For instance, in Chapter 2 I make clear the extant presence of such rationalities within contemporary European-level government.

6 Cited in Vivien A. Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization," *Journal of European Public Policy* 14, no. 7 (2007). p.1000.

The second section turns to the case of French discourse towards Europe, which, as noted above, can – at least in certain manifestations - be understood as illustrative of a Habermasian constitutional patriotism in Europe. French policy and public has resisted and often opposed a neo-liberal politics at the European level (or more generally, expressed a scepticism *vis-à-vis* processes of globalisation) and repeatedly sought to institutionalise its repoliticisation. As discussed in this chapter, such opposition is evident in a French discourse that: champions a ‘social Europe’ or ‘European Social Model’; promotes a European ‘economic government’ in the face of the constitutionalisation of monetary policy at the European level; and culminated in the French rejection of the (economic) constitutional treaty in 2005. As Donzelot notes, “the supporters of the ‘no’ vote behaved with regard to the project of a European Constitution as if it was a matter of re-enacting the ‘social contract’ against *raison d’état*.”<sup>7</sup>

## **A Legal Cosmopolitan critique of Market Cosmopolitan Europe**

### *From Discourse Ethic to Constitutional Patriotism in Europe*

The basic premise or ontology underpinning a Habermasian discourse ethic is “the implicit mastery of rules for raising and redeeming validity claims in ordinary language”<sup>8</sup>, or, more simply, “all speech is oriented to the idea of a genuine consensus –

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7 Donzelot, “Michel Foucault and Liberal Intelligence.” p.128.

8 Stephen K White, *The Cambridge Companion to Habermas* (London: Cambridge University Press, 1995). p.7.

discursively achieved consensus – which is rarely realized”.<sup>9</sup> In other words, language itself contains certain rules which facilitate agreement and this implies that rational reflection on actions and beliefs is an inherent possibility for all and leads to a consensus if all parties are able to operate on the basis of an unqualified openness to others’ perspectives and at the same time given sufficient freedom to rationally express themselves. Reason or rationality is here defined in a Kantian fashion, as the ability to embark on a self-reflective critique of tradition and authority and thereby potentially achieve alternative social orders. While such assertions might appear metaphysical, in his early work, Habermas endeavours to historically trace the sociological constitution of such qualities in a ‘public sphere’ and ‘civil society’ – specifically, he talks of a ‘propitious moment’ in the early modernity of the eighteenth century classical liberalism discussed in Chapter 1 - which are therefore conceived as immanent in extant social reality.<sup>10</sup>

It is the notion of discourse which embodies then a foundation or universal ethic for Habermas and, as we will see in Part III, for many other deliberative cosmopolitan scholars. This is not, he would claim, a substantive foundation, but one which emphasises the importance of an inherently *political* rational communicative process in achieving our political institutional arrangements.<sup>11</sup> While this ethic would appear to have strong affinities with an ideal republican model of self-rule, Habermas would contend that his discourse theory is more pragmatic because it, “does not make the

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9 Held, *Introduction to Critical Theory: Horkheimer to Habermas* p.256.

10 Jürgen Habermas, *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society*, Studies in Contemporary German Social Thought (Cambridge, Mass.: MIT Press, 1989).

11 ———, *The Philosophical Discourse of Modernity* (Mass.: MIT Press Paperback, 1990 (1985)), ———, *The Theory of Communicative Action* (Cambridge: Polity, 1986).



success of deliberative politics depend on a collectively acting citizenry but on the *institutionalization* of corresponding procedures"<sup>12</sup>. Habermas here alludes to his own strong belief in the importance of the rule of law and human rights, which guarantee both private and public autonomy; concretely, the 'institutionalisation' to which he refers is possible via the formation of a democratic constitution which is valued for its "integrative power in complex society".<sup>13</sup> As Bohman says, "[i]t is the only medium that can fulfil the demands for societywide integration and at the same time remain rooted in communicative action."<sup>14</sup>

The consensual possibilities of discourse and the importance of procedures are important elements for all the legal cosmopolitan rationalities of government considered in this part of the thesis and in Part III. However, it is important that we foreshadow here significant divergences in the practical applications of a discourse ethic, which are evident within Habermas's own interventions, but also reflected in the distinction between *statist* and *deliberative* legal cosmopolitan rationalities enunciated in this thesis. In engaging directly with both the political theory and practice of what he terms the 'post-national constellation' in Europe<sup>15</sup> an ethical tension emerges in Habermas's thought between an open, reflexive and deliberative cosmopolitanism and his closed, ethically rather thick, conception of Europe. Indeed, he shifts between his ideal Kantian cosmopolitanism

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12 Jürgen Habermas, *Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity, 1998). p.248.

13 James Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität Und Geltung," *Law & Society Review* 28, no. 4 (1994). p.913

14 Ibid.

15 Habermas, *The Postnational Constellation* ———, *Inclusion of the Other: Studies in Political Theory*. Habermas and Derrida, "February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe."; Jürgen Habermas, *Time of Transitions* (Cambridge: Polity, 2006). ———, *The Divided West* (Cambridge: Polity, 2006).

based on a discourse ethic, which is universal and global and his more pragmatic attempts to build a *distinct European* cosmopolitanism; we witness what Pensky calls "[a] dialectic of universality and situation".<sup>16</sup> Crudely, there is a tension between the closure implied in his (social) democratic ambitions for Europe and the relative openness of his own cosmopolitan reflexivity. This is explicable in terms of the sociological awareness of his normative theory (particularly in his *Between Facts and Norms*), which leads him to identify law as the immanent possibility of his discourse ethic – its development embodies 'a social learning process'.<sup>17</sup> In this context, he recognises the importance of the input of a substantive public sphere in decision making, highlighted in his early work.<sup>18</sup> However, he also displays a pragmatic awareness of the need to balance this openness to a public sphere with considerations of effectiveness in decision making.<sup>19</sup> In line with this orientation, in his more practical or situated considerations of post-national and, specifically, European, politics, Habermas delimits the public sphere and comes close to describing and promoting Europe as nation-state.<sup>20</sup>

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16 Max Pensky, "Universalism and the Situated Critic," in *The Cambridge Companion to Habermas* ed. Stephen K White (London: Cambridge University Press, 1995).p.69.

17 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity, 1996). See also Bohman, who suggests that Habermas tries to adopt a middle way between a 'sociologically naïve' ideal Rawlsian theory of justice and a purely descriptive sociology of the sort associated with Luhmann which Habermas describes as 'legal positivism'. Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität Und Geltung." p.912

18 Craig J. Calhoun, *Habermas and the Public Sphere*, Studies in Contemporary German Social Thought (Cambridge, Mass.: MIT Press, 1999).

19 Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität Und Geltung."914

20 Rather than a refutation of his Kantian legacy, this move may in fact have certain affinities with Kant - who himself has been conceived as "an unfamiliar source of nationalism" – and, indeed, reflect certain of the deep tensions in cosmopolitan thought enunciated above. Isaiah Berlin cited in David Harvey, "Cosmopolitanism and the Banality of Geographical Evils," *Public Culture* 12, no. 2 (2000). p.546.

Indeed, although he accepts the potential problems of an ethnic nationalism associated with the nation-state, Habermas is keen to note the important normative achievements of this political unit. He highlights the way in which allegiance to the constitutional democratic nation-state is based not only, or even mainly, on a crude ethnic nationalism, but also, increasingly, on a 'constitutional patriotism'; a shared belief in the values of a particular democratic constitutional arrangement. He notes the way in which political culture has in many modern European nation-states crystallised around a constitutional settlement; although a national consciousness may have been an important feature in establishing a sense of the common good and a willingness to support public services through taxation, the nation-state has become valuable above all, not because of its ability to embrace a shared cultural identity, but in terms of the possibility it affords for "democratic self control and self regulation".<sup>21</sup> The constitutional democratic nation-state has thus allowed for the cohesion of multicultural societies in contemporary Europe, although Habermas is clear that, in addition to liberal individual rights, social, cultural and economic rights are also a functional necessity for this self regulation and, therefore, for social cohesion more generally. In concrete terms he points to the way in which in post World War II Europe, the will of a democratic citizenry led to the formulation of the welfare state "whose principal goal is to secure the social, technological, and ecological conditions that make an equal opportunity for the use of equally distributed basic rights possible."<sup>22</sup>

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21 Habermas, *The Postnational Constellation* p.61.

22 Ibid. p.65.

It is the impact of economic globalisation on the solidaristic, social-democratic achievement of the European nation-state that Habermas is particularly prone to lament. With allusion to the concept of interdependence and the oft-cited idea of an 'unbundling' of the relationship between sovereignty, territory and power<sup>23</sup>, he notes that national politics is no longer adequate to address the fates of individual nation-states and this leads to a significant legitimization gap in politics and even an "abdication of politics" altogether. For Habermas, "there is a crippling sense that national politics have dwindled to more or less intelligent management of a process of forced adaptation to the pressure to shore up purely local positional advantages."<sup>24</sup> Habermas would concur with the idea that there is a 'race to the bottom' in terms of economic regulation, including taxation, which he describes critically as "the futile adaptations to the imperatives of locational competition".<sup>25</sup> To this extent he appears to concur with a neo-Gramscian analysis of the sort enunciated by Gill (see Chapter 2). Habermas, for his part, notes increased capital mobility, increased flexibility in mass production and the emergence of multi-national corporations as three factors which have eroded the balance between economic liberalisation and national economic autonomy that was established in the Bretton Woods period, or the period of 'embedded liberalism'.<sup>26</sup>

During this period, while there were important differences in the exact policies adopted by different states (as reflected in a rich literature on varieties of European welfare

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23 John Gerard Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations " *International Organization* 47, no. 3 (1993).

24 Habermas, *The Postnational Constellation* p.61.

25 Ibid. p.81.

26 Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order ".

capitalism<sup>27</sup>), it was, as highlighted in Chapter 2, a case, extremely crudely, of 'Keynes at home and Smith abroad'.<sup>28</sup> However, Habermas would seem to concur with Scharpf that, it was perhaps, "not fully realized at the time... how much the success of market-correcting policies did in fact depend on the capacity of the territorial state to control its economic boundaries."<sup>29</sup> Indeed, with the single market project European government increasingly argues that such policies are a detriment both to internal – that is European – economic prosperity and, related to this, European competitiveness. As discussed in Chapter 2, it is certainly true that European government begins to implicate itself in welfarist/ redistributive elements of member state policy. In more general terms, Habermas notes that in contemporary times there is no post-national functional equivalent to the ability of the state to pursue a redistributive policy via taxation; he highlights the empirical failure of the Tobin tax as an example of the way in which even minimalist global redistributive schemes are unable to garner political support.<sup>30</sup>

### *Market Rationalities and a 'European' Legal Cosmopolitanism*

This is painted as a bleak situation – one in which there is a readiness to abandon normative points of view because of 'unavoidable systemic imperatives'.<sup>31</sup> For Habermas the responses to this situation have ranged from a defensive nationalism that adopts and

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27 G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton, N.J.: Princeton University Press, 1990).

28 Gilpin and Gilpin, *The Political Economy of International Relations*. p.355.

29 Scharpf, "Negative and Positive Integration in the Political Economy of European Welfare States." p.16.

30 Habermas, *The Postnational Constellation* p.79.

31 Ibid. p.79. Although Habermas perhaps (wilfully or strategically) understates the normativity or ethics, which is central to the accounts of post-war market cosmopolitan advocates (see Part I and Part III).

sometimes combines the rhetoric of extreme left and right in arguing for a mercantilist and/or ethno-nationalist closure, to a desire to allow the state simply to merge into post-national networks and let go of its social-democratic achievements in favour of a post-statist libertarian future.<sup>32</sup> Both alternatives are rejected by Habermas, although arguably he fails to explain in explicit fashion why a closure around the nation-state might not be favoured; why it could not be based on a *universal* constitutional patriotism of the sort he advocates<sup>33</sup>; perhaps something approximating Rawls's ideal conception in his *Law of Peoples*<sup>34</sup> mentioned in Chapter 1. Reading between the lines, his explanation seems to be based on three factors. First, a view of globalisation as a structural, inexorable, technological imperative. Second, a normative appreciation of the irenic possibilities inherent in globalisation (and Europeanisation); like many other social theorists and, indeed, the functionalist-market rationalities discussed in Part I, Habermas notes that a 'post-conventional' stage may be immanent in certain processes of globalisation which bring to our attention complex plural realities and the need to move beyond a parochial nationalism and the 'conventional' stage.<sup>35</sup> There are affinities to be drawn here with his account of the bourgeois public sphere, which he seems to claim, echoing Kant, to some extent required market expansion in order to break down certain boundaries (even as it instigated others) and constitute a space for the ideals of equality (if a significantly circumscribed equality) and critical reflection.<sup>36</sup> This is an important tension, alluded to

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32 Ibid.pp.75-81.

33 Robert Fine and Will Smith, "Jürgen Habermas's Theory of Cosmopolitanism," *Constellations* 10, no. 4 (2003).

34 Rawls, *The Law of Peoples*

35 Vivienne Boon and Gerard Delanty, "Cosmopolitanism and Europe: Historical Considerations and Contemporary Applications," in *Cosmopolitanism and Europe*, ed. Chris Rumford (Liverpool: Liverpool University Press, 2007). pp.26-27.

36 Calhoun, *Habermas and the Public Sphere*.

in chapter 1 and one to which I return in Part III. Third, and related to this, he apparently does not wish to reinvent the wheel because of both his acute awareness of the dangers of ethno-nationalism, particularly in the German context, and also the ethical problems of the bureaucratic interventionist state, whose very 'legitimation crisis' arguably precipitated the emergence of the depoliticised Hayekian neo-liberalism at the centre of his critique.

Habermas's rejection of the libertarian, anti-bureaucracy, alternative is more explicit and based on both the abovementioned social democratic virtues of the closure achieved by the nation-state and the dire social consequences of what he sees as a global *laissez faire* alternative. Above all Habermas is acutely aware of "the shocking price that a reckless monetarization of the lifeworld would demand".<sup>37</sup> In particular, he outlines the way in which his neo-Republican democratic vision is incompatible with a neo-liberal conception of freedom:

This [neoliberal] conception of freedom is linked with a normatively diminished conception of the person. The concept of the person as a "rational decider" is not only independent of the idea of the moral person who determines her will through an insight into what is in the interests of all those affected; it is also *independent of the concept of the citizen of a republic, who participates in the public practice of self-legislation under equal rights*. Neoliberal theory deals with private subjects who "do and permit what they will" according to their own preferences and value orientations within the limits of legally permissible actions.... With this concept of a "society based on private rights" neoliberalism also calculates that *the use-value of civil liberties is consumed in the enjoyment of private autonomy...*

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37 Habermas, *The Postnational Constellation* p.87.

Neoliberalism is thus *unreceptive to the republican idea of self-legislation*, according to which private and civic autonomy presuppose one another.<sup>38</sup>

In Habermas's view then, neo-liberalism is not simply a rationality of government which is sceptical as to the value of state intervention in the private or market domain. It is also anathema to the neo-republican democratic ideal of self-legislation, which, contra neo-liberalism's egoism, is based on a solidaristic or consensual possibility. Moreover, it is destructive of certain civil rights which permit the functioning of a republican democracy, because they serve no purpose under a market based government where only private autonomy and therefore the safeguarding of property rights is privileged. A neo-liberal world is thus both unequal and undemocratic and this is a self-reinforcing situation. In the European context, the (neo) liberal economic constitution (see Chapter 2) may in fact undermine social contractarian rights to the extent that it impinges on the capacity of national governments to provide them, and, in neo-republican fashion, on the ability of the people to ensure that national governments provide them. As Balibar states:

Seeking its own interest and/or claiming to represent the only genuine expertise in the complex global confrontations, the political class has monopolized the mediating position between national administrations and the new 'central' bureaucracy... [G]iven that an increasing number of political decisions, which directly or indirectly affect the lives of the citizens, can be made only in the form of agreements reached after negotiations between 'national' and 'supranational' bureaucracies, this has ... considerably reduced the capacity of the civil societies in each particular state to actually control, influence, and, in the end, shape the politics of their national government, as every union activist knows by experience.<sup>39</sup>

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38 Ibid. p.94 (emphasis added).

39 Etienne Balibar, "Europe as Borderland," *Environment and Planning D: Society and Space* 27, no. 2 (2009).



In revaluing and reasserting the 'subject of right' – and an associated legal cosmopolitan rationality of government - Habermas argues for a closure that we may have once associated with the social democratic and social contractarian possibilities afforded by the nation-state, although this closure or reassertion of politics can (and, for Habermas, *should*) take place at a supranational level. As he says, "an alternative to the abdication of politics would be if politics were to follow the lead of the markets by constructing supranational political agencies. Europe in transition towards the European Union provides a suitable example."<sup>40</sup> In summation of his position he asserts that, "lifeworlds that have disintegrated under the pressure of opening have to close themselves anew – now, of course with *expanded* horizons."<sup>41</sup>

There is clearly a tension between Habermas's call here for closure and his own ethical goal of achieving a Kantian cosmopolitan law based on a communicative rationality on a global scale. As Bohman notes, his conception of freedom is one of 'self-determination' and this "suggests that the task of cosmopolitan democracy is to use the binding power of positive law to introduce political control beyond the nation-state."<sup>42</sup> However, for Habermas – if not for other cosmopolitan democrats – this is not easily or practicably achieved on a global scale. This move to a post-national Europe seems then to be based on a shift from an *ideal* view of the possible to a *politically embedded* understanding of more contingent political possibilities; a realisation of the absence of a sufficiently robust global civic solidarity in which to ground a truly global cosmopolitan democracy. Our

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40 Habermas, *Inclusion of the Other: Studies in Political Theory*, 123.

41 ———, *The Postnational Constellation* 83.

42 Bohman, *Democracy across Borders : From Demos to Demoi*.p.26.

*horizons* are merely *expanded* to the possibilities for closure within a post-national constellation, which is already evident, or at least immanent, in the *sui generis* reality of the European Union. Of course, Habermas is careful to note that this renewed closure is based on a *universal* conditionality – for him this equates to the democratic possibilities of his discourse ethic – which is, in any case, already informing responses to multi-cultural realities within nation-states.<sup>43</sup> Thus Habermas's vision of Europe is, he would claim, distinct from many recent efforts to perceive a common cultural-historical lineage – say a Judeo-Christian or Greco-Roman identity – in Europe.

As highlighted at the end of Chapter 2, such a concern with defining a European demos and citizenry has emerged in practice to some extent, particularly since the Maastricht treaty which established the EU and set the foundation for the expansion of European government's competences to areas concerned with, *inter alia*, *justice*, *freedom* and *security*. In invoking the concept of EU citizenship, the Maastricht treaty accords with a legal *cosmopolitan* rationality, rendering citizenship transnational and promoting the view that it is the citizens which ultimately legitimise the EU.<sup>44</sup> Important scholars of cosmopolitan deliberative democracy, such as Held, Bohman and Habermas all, similarly, "require that global [or transnational] political power be justifiable not from the perspective of representatives of states...but from the perspective of citizens."<sup>45</sup> At the same time, in the

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43 Habermas, *The Postnational Constellation* p.84.

44 "ARTICLE 8: 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby."

Maastricht Treaty, 7 February 1992

45 William Smith and James Brasset, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives," *Ethics & International Affairs* 22, no. 1 (2008). p.81.

'Birmingham declaration'<sup>46</sup> an emphasis is placed on trying to *convince* EU citizens of the benefits of the Maastricht treaty and the constitutionalisation of monetary policy; in other words, convince them of a market cosmopolitan rationality.<sup>47</sup> Schengen is similarly not concerned with securing the social-contractarian possibility at European level, but, rather, with ensuring unrestricted movement of certain citizen subjects within EU(rope). While, as highlighted, there have certainly been important ruptures in the EU's governing rationality over time, there is an important path dependency here from the founding of the ECSC and Treaty of Rome in terms of the particular subjectification of individuals as *market* citizens (as discussed in Chapter 2). In summary, while a sovereign legal cosmopolitan discourse is present in EU(rope)'s prevailing governmentality – in other words, a discourse of citizenship and borders is very much present - it is for the most part put to the service of an expanding neo-liberal biopolitics.

Habermas would seem to concur. He is aware that the neo-liberalism that he associates with the process of economic globalisation, does not meet a significant adversary in the prevailing purpose of the European Union; indeed, he would seem to agree with the assessment of EU(rope) provided in Chapter 2, as, to a large extent, the manifestation of a market cosmopolitan rationality. Like many social democrats in Europe, Habermas would like to see the EU offer a more solid bulwark against certain global neo-liberal tendencies and perhaps perform the functional role that the nation-state had previously played. However, this would require a *transformation* of the currently prevailing

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46 During the ratification process for the Maastricht treaty the European Council issued this so-called 'Birmingham Declaration' on the importance of establishing 'a community close to its citizens'. See, European Council, "Presidency Conclusions," (Birmingham: 1992). Annex I.

47 Ibid.

'intergovernmental market construction'. In concrete terms, Habermas seems to have rather federalist aspirations and advocates the substantive harmonisation of social, labour and tax policy in Europe. At the same time he is critical of the failure to date of initiatives which might allow for such harmonisation and the lack of political appetite for shifts in this direction. He notes, in accordance with the above, the way in which ambitious projects have often been reduced to the market oriented goal of eliminating the obstacles to labour market mobility. Habermas is clear that any shifts towards the kinds of policies he favours must be based on a legitimate, democratic process of will-formation at the European level. In this context he is a strong advocate of a formal European constitution, which for him – in accordance with the notion of a co-originality of rights and democracy - might establish the democratic processes through which will formation at the European level may take place and a community of fate based on deliberation may develop.<sup>48</sup> This would involve, above all, the overturning of the extant economic constitution (discussed in Chapter 2) and its replacement (or its supplementation) with a far more substantive juridico-political constitution. A major difficulty, however, is how to establish a constitution of the sort that would support and instigate the legal cosmopolitan rationality that Habermas promotes. The *actual* attempt to construct and establish a constitution for Europe was perceived by many as confirming Gill's neo-liberal 'new constitutionalism' thesis rather than instigating a neo-Republican European rationality of government in the sense advocated by Habermas.

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48 Habermas, *Inclusion of the Other: Studies in Political Theory*, p.156.

An empirical case of particular interest in this respect is the rejection of the constitutional treaty by France, a member state and populace which, like Habermas, has frequently conceived of Europe simultaneously as the embodiment of a neo-liberal globalisation and as *the possibility* to resist neo-liberal globalisation through the instigation of neo-Republican values. In the following section French policy towards EU is analysed as an example of this sometimes convoluted neo-republican legal cosmopolitan resistance to prevailing market cosmopolitan rationality.

### **Resisting the Market Constitution in practice: French constitutional patriotism**

In one sense it might seem strange to draw a parallel between Habermas's legal cosmopolitan approach which is rooted in the notion of a European constitution and French politics on/towards Europe, which, in recent times is perhaps most notable for the French people's rejection of the constitutional treaty in its referendum in 2005. Habermas is, of course, German and undoubtedly influenced primarily by this European social context<sup>49</sup> and in France Habermas is not necessarily a scholar who has made a significant or at least an obvious impact on public discourse or policy.<sup>50</sup> However, such parallels are

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49 Charles Turner, "Jürgen Habermas: European or German?," *European Journal of Political Theory* 3, no. 3 (2004).

50 That said, Favell notes the way in which the concept of 'nouvelle citoyenneté', which became popular in French public discourses on integration in the 1990s, was to a large extent influenced by Habermas's ideas. While he notes that such a conception (synonymous with Habermas's notion of constitutional patriotism) failed to emerge due to the fact that immigration and integration policies remained state-centric in Europe, the very state-centric French conception of citizenship is itself, at least rhetorically, founded on a cosmopolitan ideal and it is such an ideal that France has advocated in its promotion of European level immigration policies, as will be discussed in greater detail in the following chapter. Adrian Favell,

sustainable when we note a French *constitutional patriotism* within the French polity – particularly a strong support for the French welfare state – and a strong support for Europe as *idea*, even as the French people rejected the constitutional treaty. Indeed, as I will argue, the rejection of the constitutional treaty was largely a rejection of a market cosmopolitan EU(rope) and corresponding realisation that the constitution was not one which could foster much ‘patriotism’ among the French; it was a long way from reproducing the constitutional settlement within the *patrie* at a European level. There is, then, as in Habermas’s work, a dual concern with universalism – as embodied in a constitution – and a solidarity, consensus and associated neo-Republican space as its site and possibility.

As Favell notes in relation to a prevailing French policy discourse on questions of immigration and integration, “France as a political entity is the constitutional paragon of a nation-state entirely conforming to the universal idealist model inscribed in international law”.<sup>51</sup> Much French policy and discourse towards EU(rope) thus wishes for it to be reinvented in France’s image, which is always-already the embodiment of a universal or cosmopolitan ideal, even as French exasperation with Europe’s cosmopolitan lack is frequently and simultaneously in evidence. Thus, it is argued that French policy towards Europe offers, at least in certain respects, *one possible* empirical illustration of the ways in which a legal cosmopolitan governmental rationality advocated for Europe by Habermas is manifest in European politics. France is a nation-state, whose elites and

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*Philosophies of Integration : Immigration and the Idea of Citizenship in France and Britain* (Basingstoke: Macmillan, 1998).

<sup>51</sup> Ibid.

people have promoted a strong role for the *universal* nation-state and, correspondingly, have often advocated an EU(rope) as nation-state. This is not to say that France has adopted an unambiguously pro-European stance; while many of the key architects of the European project were French, certain French actors – most notably, President de Gaulle in the mid-1960s – have unambiguously privileged France. In general, it can be said that there has been much equivocation on the promise and possibility of Europe to encompass the ideals of the universal nation-state. Whatever the conclusion of such equivocation, it should be noted that the very primacy of nation-state as a source of legitimacy stands in stark contrast to the German ordo-liberal *reversal* discussed in Part I, whereby the market becomes the ultimate source of the legitimacy and the *state works for the market*. Such differences have manifest both historically – consider Commission President Hallstein’s fateful clash with de Gaulle and France’s ‘empty chair’ policy in 1965<sup>52</sup> - and in contemporary differences between France and Germany on economic issues, discussed in detail below.<sup>53</sup>

### *French resistance I: Dirigisme and social Europe*

Vivien Schmidt describes the French model of capitalism as ‘statist’, emphasising the idea of a strong role for the state. This statist or *dirigiste* approach assumes that the state operates as an organiser and regulator of economic activity, a protector of the public

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<sup>52</sup> While this event is understood primarily – in the language of the neo-functionalist-intergovernmentalist debate - as a clash between supranational Commission President and nationalist member state President, it was also a clash of governmental rationalities: a German ordoliberal against French market interventionist. In terms of rationalities such clashes continue at the level of European government itself, as discussed below.

<sup>53</sup> Maes, "On the Origins of the Franco-German EMU Controversies."

sector and as a strategic actor. In such a variety of capitalism the state tends to adopt an interventionist role towards business and labour organisation, mediates in inter-firm relations, provides investment for private enterprise and controls wage bargaining.<sup>54</sup> Although there has been a continuity in the distinct role of the state in France, its capitalism has arguably undergone a shift from 'state-led' to 'state-enhanced'.<sup>55</sup> Clift talks of two distinct phases in the restructuring of French capitalism in the last two decades: First, a phase of 'protected' restructuring, between 1983 and 1996, when the state's main role was to direct the adjustment process to a considerable degree. Second, from 1996 onwards, we have seen a progressive dismantling of elements of the barriers behind which elites restructured the French economy.<sup>56</sup> Throughout the entire period, France would largely liberalise the financial markets, implement a large-scale privatisation programme and deregulate a range of industrial sectors, including limited deregulation of the cherished *service public* (public utilities plus infrastructural services).<sup>57</sup>

When the reform process began in the early 1980s, it was largely because the governing French socialists under the Mitterrand Presidency realised that the economic integration of the EU – which had become an important policy objective – no longer permitted a space for the discourse of *grands projets* in public service provision of the sort espoused by

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54 Vivien A. Schmidt, *The Futures of European Capitalism* (Oxford; New York: Oxford University Press, 2002). ———, "French Capitalism: Transformed, yet Still a Third Variety of Capitalism," *Economy and Society* 32, no. 4 (2003). See also, Ben Clift, "The French Model of Capitalism: Still Exceptional?," in *Where Are National Capitalisms Now?*, ed. Jonathan Perraton and Ben Clift (Palgrave, 2004). ———, "The Changing Political Economy of France," in *A Ruined Fortress?: Neoliberal Hegemony and Transformation in Europe*, ed. Alan W. Cafruny and Magnus Ryner (Rowman and Littlefield, 2003).

55 Schmidt, *The Futures of European Capitalism*.

56 Ben Clift, "Debating the Restructuring of French Capitalism and Anglo-Saxon Institutional Investors: Trojan Horses or Sleeping Partners?," *French Politics* 2, no. 3 (2004).p.334.

57 Schmidt, *The Futures of European Capitalism*.pp.534-5.



de Gaulle, nor the extensive nationalisation programmes that Mitterrand had himself instigated.<sup>58</sup> In particular, in 1983 it became clear to Mitterrand that a lack of competitiveness vis-à-vis Germany in the context of the European Monetary System (EMS) was putting significant pressure on the French franc and a policy shift would be necessary if France wished to maintain its commitment to the European project.<sup>59</sup> Maes has argued that Mitterrand's initial policy orientation in the early 1980s can be seen as a 'last grasp' (sic) of a French interventionism, which had already been changing in the wake of the oil price crisis in 1973 and Prime Minister Raymond Barre's liberalising policies in late 1970s in the context of which Germany consented to the EMS.<sup>60</sup>

In explaining these reform agendas to a public used to strong state intervention, France's elites have generally rationalised and justified the reform process in terms of the exigencies of a European common or single market rather than globalisation.<sup>61</sup> Indeed, they have moved in accordance with the logic of the EU's various timetables, which have gradually eroded the space for a traditional French *dirigisme*. Simultaneously, the rhetoric on globalisation – usually understood in neo-liberal economic or crude *Americanising* cultural terms – from both elites and popular movements has remained broadly hostile. Thus, notwithstanding a change of direction and a real impact from market cosmopolitan rationalities emanating from EU level governance, the particular historical and cultural legacy of Republican *dirigisme* meant that many of France's elites

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58 Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*.

59 Maes, "On the Origins of the Franco-German EMU Controversies." p.30.

60 Ibid.p.30.

61 Hay and Rosamond, "Globalization, European Integration and the Discursive Construction of Economic Imperatives." Alistair Cole and Helen Drake, "The Europeanization of the French Polity: Continuity, Change and Adaptation," *Journal of European Public Policy* 7, no. 1 (2000).

across the political spectrum have never wholly embraced the ideological arguments for market driven neo-liberal capitalism.<sup>62</sup> Correspondingly, the European push towards orthodox economics has been periodically resisted by variously a French or European dirigisme.

In a sense then, the market cosmopolitan rationality operating within EU(rope) – particularly since the advent of the single market in the mid-1980s - has never been fully transposed into the French system, even as French elites have acquiesced in the policy process. Indeed, the manner of economic liberalisation in France has often betrayed a scepticism from the elites themselves regarding the reform agenda. Although deregulation, privatisation and labour market decentralisation transformed the role of the French state, while financial market liberalisation increased business freedoms, the French state has never entirely given up its role. Historically French governing elites have supported 'Europeanist' fractions of capital in such organisations as the ERT and have been strong promoters of the Common Agricultural Policy (CAP) which is essentially a form of 'state-aid' writ European.<sup>63</sup> This mirrors state interventionism domestically, where the state has *inter alia* bailed out large ailing firms, tried to block the liberalisation of corporate control in Europe and sought to impact business through regional development funding initiatives and interventionist legislation on labour policy (most famously, Jospin's 35-hour week, introduced in 2000).<sup>64</sup>

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62 Clift, "The French Model of Capitalism: Still Exceptional?."

63 For example, note the 'French memorandum on common industrial research area' of 1983 described by Apeldoorn, *Transnational Capitalism and the Struggle over European Integration*. p.117-

64 Schmidt, *The Futures of European Capitalism*.p.536.

As intimated above, we should be careful not to associate this reluctance to reform exclusively with a traditional social democratic opposition; it has been as much to do with a tradition of the 'high modernist' centralism, considered in relation to Monnet's role in Europe in Chapter 2 (often considered simply to be a *dirigiste* elitism). Industry, finance and the civil service have traditionally been controlled by a relatively closed and overlapping 'hard core' elite, or *noyaux durs* who tend to be graduates of the coveted French *grands ecoles*.<sup>65</sup> This is not to claim that no French elites have embraced neo-liberal rationalities. Abdelal, for example, notes the perhaps paradoxical roles played by French policy makers located in international institutions in the process of global capital liberalisation, including Jacques Delors as European Commission President.<sup>66</sup> And Maes notes, for example, the gradual embedding of French economic policy actors in international economic institutions.<sup>67</sup> Delors was also, of course, a key architect of EMU. However, while many conservative liberals in the French *Tresor* and central bank supported EMU in order to promote orthodox liberal economic policy more broadly, Delors seemed to be pursuing what Clift calls a 'long game', or what Wincott refers to as 'Russian dolls', in the European arena: "market integration was to be followed by social re-regulation and perhaps even the (re)construction of some form of 'organized capitalism' in Europe".<sup>68</sup>

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<sup>65</sup> See, for example, Clift, "The French Model of Capitalism: Still Exceptional?."

<sup>66</sup> Rawi Abdelal, "Writing the Rules of Global Finance: France, Europe, and Capital Liberalization," *Review of International Political Economy* 13, no. 1 (2005).

<sup>67</sup> Maes, "On the Origins of the Franco-German EMU Controversies."

<sup>68</sup> Daniel Wincott, "The Idea of the European Social Model: Limits and Paradoxes of Europeanisation," in *The Politics of Europeanization*, ed. Kevin Featherstone and Claudio M. Radaelli (Oxford: Oxford University Press, 2003). p.294. On Delors' politics see, for example, the website of the think-tank Notre Europe, which he founded in 1996 and where many of his recent speeches can be found.

While French elites have been constrained by globalisation and increasingly the EU (and even accepted certain of its supposed imperatives), many - like Delors at EU level - have played this 'long game', resisting the disciplinary logic of a hegemonic *anglo-saxon* neo-liberalism. Many French policy makers have supported certain neo-liberal policies in the short term, implementing a broad domestic reform process in order to maintain credibility in the system, while hoping (and *claiming* to the French public) that this will provide them with the influence to impose a more *dirigiste*, 'social' or interventionist rationality at the European level in the long term. In this way, perhaps Mitterrand's abovementioned evocation of a constitutional patriotism at European level might ultimately be realised.<sup>69</sup> In this context, the notion of a 'European social model' or 'social Europe' has been frequently invoked by French elites. Mitterrand had claimed paternity for the idea of 'social Europe' in the 1980s and Jospin, in refusing to accept the inexorability of neo-liberal globalisation, promoted the concept as a buffer against the worst extremes of an anglo-saxon neo-liberalism in the late 1990s.<sup>70</sup> Demonstrating the political appeal of the concept to the French public in the early 2000s, even the centre-right President, Jacques Chirac, got on the 'social Europe' bandwagon, dating the emergence of the European social model to a memorandum he had presented to the G7 summit in Lille in 1996. Moreover, following the French presidency of the EU in the second semester of 2000, the French government presented the promotion of the European social model as one of its main achievements and the promotion of a social

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69 Translation: 'everything comes together, our nation, our Europe, Europe our nation', Mitterrand, 1986. Cited in Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization."

70 Lionel Jospin, *Ma Vision De L'europe Et De La Mondialisation* (La Fondation Jean Jaures, 2002).

Europe also featured in the plans for the 2008 French presidency.<sup>71</sup> However, the degree to which France has been able to impose its particular conception of a social Europe at the European level has to date been limited, just as Delors' strategy from inside the Commission was not to prove entirely successful. Indeed, it has been noted that a significant gap exists between, on the one hand, the realities of economic liberalisation in the EU and France, and, on the other hand, a French elite discourse on the European project which accords with an image of Europe in France's image and a corresponding popular discourse which remains hostile to a neo-liberal discourse of globalisation.<sup>72</sup>

### *French resistance II: Economic government*

In France, the idea of a social Europe has often been connected to the possibility of economic government, or *gouvernement économique*, both at the EU and domestic levels. Such government is called upon to loosen the apparent constraints imposed on social and welfare policy autonomy by an independent supranational monetary authority concerned primarily with stability and austerity. As Prime Minister during the final stages of EMU, Jospin's aim in this area was the establishment of a supranational, socially oriented economic government as a counterbalance to European Central Bank (ECB) monetary policy with its emphasis on 'sound' money. As Howarth notes, economic

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71 Susan Milner, "Protection, Reform and Political Will: France and the European Social Model," in *French Relations with the European Union* ed. Helen Drake (London; New York: Routledge, 2005). p.106. On plans for 2008, see Euractiv, "2008 'the Year to Restart Social Europe', Says French Minister," (10 June 2008), <http://www.euractiv.com/en/social-europe/2008-year-restart-social-europe-french-minister/article-173188>. Accessed August 2010.

72 Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization." Hay and Rosamond, "Globalization, European Integration and the Discursive Construction of Economic Imperatives."

government can be understood in a variety of ways, but in France it has usually involved the promotion of an agenda which aims to open monetary policy to politico-economic consideration, particularly an emphasis on growth and employment alongside stability.<sup>73</sup> This is in contrast to the strict central bank independence observed in Germany, with its ordoliberal inspired monetary policy. These specific differences in the orientations of the two 'motors' of integration are explicable in terms of France's republican heritage in general and, in particular, its successful use of a 'high-modernist' inspired plan (see Chapter 2) in its post-war economic recovery, which stands in stark contrast to the German post-war 'economic miracle' which was largely attributable to the ordoliberal inspired return to the free market.<sup>74</sup> Such differences remain significant in contemporary EU politics, as discussed further below.

Politicising EMU through a *voluntariste* economic government has been a feature of French policy since Maastricht, but has not been achieved in the face of these German preferences. Indeed, the stability and growth pact (SGP) agreed by the Juppé government in the mid 1990s ran counter to the *dirigiste* desire to maintain a degree of manoeuvre in domestic economic policy making and precluded an interventionist economic governance. Jospin did not fare much better; as Clift notes, "...only the minimalist agenda prevailed and all Jospin's more ambitious and maximalist plans

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73 David J. Howarth, "Making and Breaking the Rules: French Policy on EU 'Gouvernement Economique'," *Journal of European Public Policy* 14, no. 7 (2007). p.1070 Ben Clift, "The New Political Economy of *Dirigisme*: French Macroeconomic Policy, Unrepentant Sinning and the Stability and Growth Pact," *British Journal of Politics & International Relations* 8, no. 3 (2006). See also, Kenneth Dyson, "Benign or Malevolent Leviathan? Social Democratic Governments in a Neo-Liberal Euro Area."

74 Maes, "On the Origins of the Franco-German EMU Controversies." p.25.

founded in the face of an unenthusiastic response from European partners".<sup>75</sup> Given the apparent strength of the German ordoliberal-inspired model of independent monetary policy and, in particular, a fully independent central bank focused on austerity principles, it was this approach that had prevailed in discussions on monetary union in the late 1980s and this model was ultimately afforded a constitutional status that it had not even had in the German context.<sup>76</sup> Indeed, practical French proposals for *gouvernement économique* at the European level – notably proposals to involve the European Council in the monetary policy making agenda – were strongly opposed by Germany (see Chapter 2 for more on this). On the one hand then, EU economic government showed itself to be politically inflexible even when social democratic governments came to power in Germany and France in the late 1990s, with the inexorable need to remain credible to capital trumping social concerns.<sup>77</sup>

On the other hand, France's resistance to the imperatives of EMU has allowed for the preservation of a more substantive or redistributive social agenda, at least in domestic politics. France's reluctant assent to the SGP rules can be explained in terms of the 'long-game' mentioned above, whereby France sought legitimacy with its counterparts in the EU (especially Germany) in order that it might be granted greater influence at a more

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75 Ben Clift, *French Socialism in a Global Era : The Political Economy of the New Social Democracy in France*, Politics, Culture, and Society in the New Europe (New York: Continuum, 2005). p.183.

76 In particular, in the context of the so-called Delors Committee on monetary union. See, for example, Maes, "On the Origins of the Franco-German EMU Controversies." pp.34-5.

77 Gill, "European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe." p.6. Although German Finance Minister, Oskar Lafontaine was in broad agreement with Jospin in the late 1990s, he lost an internal battle with Schroeder who preferred the maintenance of the EMU status-quo and this led to Lafontaine's resignation in February 1999. See, for example, Kenneth Dyson, "Benign or Malevolent Leviathan? Social Democratic Governments in a Neo-Liberal Euro Area." and Shawn Donnelly, "Explaining EMU Reform," *Journal of Common Market Studies* 43, no. 5 (2005).

opportune moment in the future.<sup>78</sup> Significantly, French assent to the SGP has not meant obeying the rules discursively or in practice: French opposition to the constraining features of the SGP and ECB goal-setting independence has been reflected in its discourse since 1996 (from both socialist and the centre-right actors, including Sarkozy) and its persistent and 'unrepentant' breaching of SGP rules. It was also apparent in its strong support for the SGP reforms, implemented in 2005 (following the establishment of a common policy position with Germany).<sup>79</sup> These reforms involved a significant relaxation of the rules on running a public deficit and in effect permitted and legitimised the sort of counter-cyclical fiscal policy that was actually being practiced.

For Clift, the 2005 SGP reform represented the success of the French 'long game', narrowly conceived, if not Jospin's broader 'Euro-Keynesian' ambitions.<sup>80</sup> While EMU and the SGP contain a disciplining intent, this is itself subject to political contest, as French resistance and reform of the SGP demonstrates. Indeed, the space for political contest and a domestic redistributive social policy, which runs counter to a neo-liberal rationality, has not been entirely closed by the constitutionalisation of monetary policy in the EU.<sup>81</sup> Indeed, France has preserved a space for domestic economic governance

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78 Clift, "The New Political Economy of *Dirigisme*: French Macroeconomic Policy, Unrepentant Sinning and the Stability and Growth Pact."

79 Howarth, "Making and Breaking the Rules: French Policy on EU 'Gouvernement Economique'." pp.1062-4; Clift, "The New Political Economy of *Dirigisme*: French Macroeconomic Policy, Unrepentant Sinning and the Stability and Growth Pact." p.399 Donnelly, "Explaining EMU Reform." Patrick Leblond, "The Political Stability and Growth Pact Is Dead: Long Live the Economic Stability and Growth Pact," *JCMS: Journal of Common Market Studies* 44, no. 5 (2006)..

80 Clift, "The New Political Economy of *Dirigisme*: French Macroeconomic Policy, Unrepentant Sinning and the Stability and Growth Pact."

81 This argument runs contrary to Gill, "European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe." See, Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'Social Europe' and 'Soft' Governance."



through re-politicising monetary policy at the EU level and thereby also contributed to the opening of possibility – if not the reality - for alternative, legal cosmopolitan, governing agendas to emerge at this level through the relaxation of the SGP.

### *French Resistance III : A 'non' to Market Europe*

Not long after the March 2005 reforms to the SGP we witnessed an even more dramatic instance of French resistance to a perceived constitutionalisation of neo-liberal EU(rope): the rejection of the Constitutional Treaty in May 2005. While other factors were relevant, the rejection of the Constitutional Treaty represented an important moment of political resistance to both neo-liberal market cosmopolitan EU(rope) and its domestic implications. As Ivaldi puts it, "the most significant element in the [French] rejection of the European Constitution was the retrospective performance evaluation vote on the EU model of social and economic governance".<sup>82</sup> The 'non' can be tied then to the failure of the 'long game' – broadly conceived - to establish a social cosmopolitan purpose in/for EU(rope) and thereby challenge a neo-liberal hegemony globally or alleviate the impact of the structural reform process within France. Alternatively, as Schmidt notes, French elites might have done more to develop a legitimating discourse for the EU *as it is* rather than oscillating between a discourse which deployed 'Europe' to deflect blame for structural reform and one which held it up as the great hope for a more 'social' future.<sup>83</sup>

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82 Gilles Ivaldi, "Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia," *West European Politics* 29, no. 1 (2006), p.59.

83 Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization."

Indeed, the failure to match rhetoric and reality can be seen as an underlying reason for the rejection of the Constitutional Treaty in 2005.<sup>84</sup>

This political moment sent shock waves, not only through the French government and mainstream opposition parties, but throughout the EU. A founding member of the EC, a long time supporter of further European integration and a state where the public had traditionally strongly supported the European ideal, had thrown a spanner in the works of the integration project. The French 'non' has been explained in various ways, including: public dissatisfaction with the governing elites, particularly Chirac and then Prime Minister, Jean-Pierre Raffarin, which had already manifested itself in the 2002 Presidential elections; worries regarding domestic economic problems, particularly high unemployment; and concern that the EU's enlargement policy would reduce French influence, as well as hostility towards the start of accession negotiations with Turkey.<sup>85</sup> As regards the political loyalties of those who opposed the constitutional treaty, supporters of far left and far right parties voted overwhelmingly against the constitution

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84 This relates to the political difficulties of the left in France and elsewhere in Europe (highlighted in Chapter 1 with reference to the compromise of a German social-democracy with a neo-liberal governmentality). As noted in Chapter 1, Foucault has claimed that there is no independent socialist governmentality and that socialist parties have accepted to some degree a neo-liberal governmentality. In France there is a certain denial of this (a denial to which Foucault may, in part, have been responding to in a typically provocative manner with his essays on liberal government). Of course, a broader public discourse remains highly critical of a neo-liberal *ideology* and this is reflected in a continued greater role for the state (and 'statist-legal' rationalities domestically and in/for EU(rope)). For further discussion of France, see Donzelot, "Michel Foucault and Liberal Intelligence."

85 For descriptive reviews see in particular, Ivaldi, "Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia.", Henry Milner, "Some Reflections on France's Rejection of the EU Constitution," *PS: Political Science & Politics* 39, no. 02 (2006), Sylvain Brouard and Vincent Tiberj, "The French Referendum: The Not So Simple Act of Saying Nay," *Political Science and Politics* 39, no. 2 (2005), Paul Hainsworth, "France Says No: The 29 May 2005 Referendum on the European Constitution," *Parliam Aff* 59, no. 1 (2006), Nicolas Sauger, Emiliano Grossman, and Sylvain Brouard, *Les Français Contre L'europe ? Les Sens Du Référendum Du 29 Mai 2005* (Presses de Sciences Po, 2007).

due to a general hostility to the European project, but it was mainstream socialist voters that seemed to make the real difference. Correspondingly, it was the no campaign mobilised by the left – supported by high profile moderate figures such as Laurent Fabius, as well as more radical popular actors, such José Bové and the NGO ATTAC - that was arguably decisive in securing the rejection of the constitution.<sup>86</sup> As ATTAC put it, making clear the nature of their opposition:

[L]e référendum qui s'annonce a une portée historique. Il offre la possibilité de dire « non » aux politiques néolibérales qui maltraitent la société depuis plus de 20 ans... La victoire du « non » est une immense chance, à ne pas laisser échapper, pour reconstruire l'Europe sur de nouvelles bases.<sup>87</sup>

According to both exit polls and post-referendum Eurobarometer data, one reason for opposition to the constitution was domestic social and economic concerns, particularly relating to unemployment, which were shared by supporters of the far right, far left, *souverainistes* conservatives and centre left opponents. According to exit polls, the related perception of the EU as too 'liberal' and not 'social' enough was also a decisive reason for the French 'non'.<sup>88</sup> While the Eurobarometer survey in its analysis seeks to neatly separate domestic socio-economic concerns from European factors, emphasising the importance of the former, it seems clear that dissatisfaction with domestic socio-economic

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86 Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization."

87 Jacques Nikonoff, ATTAC (2005). Speech during Attac meeting at Aubagne on the eve of the referendum. My translation: "For Attac the upcoming referendum is of historic significance. It offers the possibility to say no to a neo-liberal politics which has mistreated society for more than 20 years. ... The 'non' victory represents an immense chance, not to be missed, to reconstruct Europe from a new foundation." [www.attac.fr](http://www.attac.fr). Accessed August 2009.

88 Ipsos, 'Référendum 29 Mai 2005 : Le sondage sorti des urnes' (exit poll data), <http://www.ipsos.fr/canalipsos/poll/8074.asp>. Accessed August 2010.

European Commission, 'The European Constitution : Post Referendum Survey in France', Flash Eurobarometer, June 2005, [http://ec.europa.eu/public\\_opinion/flash/fl171\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl171_en.pdf). Accessed August 2010.

issues cannot be entirely divorced from the perception that the EU had for a long time played a role in bringing about the domestic situation, as intimated in the left campaign's focus of critique, described by Schmidt:

Most of the detailed criticism was focused on Part III [of the constitutional treaty]... which merely reiterated past treaties. But this became the opportunity to question the free market basis of the EU since the Treaty of Rome and the economic changes since the 1980s in which the EU was the Trojan horse bringing in the forces of globalization, destroying French *services publiques*, and undermining the welfare state.<sup>89</sup>

Perhaps the shock at the referendum result should not have been so great given France's *petit oui* in favour of the Maastricht treaty – just 51 per cent of voters supported the treaty in the 1992 referendum. Indeed, Grossman argues that since the *petit oui*, there has been an “awakening of French public opinion to EU issues”,<sup>90</sup> which is part of a broader process of the politicisation of European integration as an issue of increasing salience for public opinion throughout the EU.<sup>91</sup> In the past ‘Europe’ had managed to bear the weight of much of the blame for structural reform in France, due to the simultaneous perception (supported in elite discourse) that the EU might ultimately save Europe and France from the worst excesses of neo-liberal globalisation. It seemed that such a view was no longer believable; indeed, words of the sort uttered by socialist constitution-enthusiast Jack Lang during the campaign, claiming that the EU constitutes a “weapon against the destructive

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89 Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization." p.1005. Socialists such as Fabius also used the Commission's proposed directive on services in the internal market - popularly known as the 'Bolkenstein' directive, after the former internal market Commissioner Frits Bolkenstein - as a symbol of the precariousness of a neo-liberal Europe. We return to this issue in the following chapter.

90 Emiliano Grossman, "Introduction: France and the EU: From Opportunity to Constraint," *Journal of European Public Policy* 14, no. 7 (2007).p.984.

91 Liesbet Hooghe and Gary Marks, "Europe's Blues: Theoretical Soul-Searching after the Rejection of the European Constitution," *PS: Political Science & Politics* 39 (2006).

and hostile ultra-liberal capitalist ideology" were no longer convincing.<sup>92</sup> The left's 'no to the constitution' campaign in 2005 successfully undermined this idealistic perception, as reflected in the voting: despite official Socialist Party (*PS*) backing for the constitution, 56 per cent of *PS* supporters opposed the constitution, whereas 78 per cent had voted in favour of Maastricht.<sup>93</sup> Europe was perceived by such opponents to be emulating rather than challenging a 'mondialisation sauvage'.

This is not to say that a European vision perished with the rejection of the constitution. The majority who voted no were not anti-European *per se* but rejected 'this Europe'.<sup>94</sup> Support for Europe as a project and even backing for the very idea of a constitution remained strong even as this constitution was rejected. According to exit polls 70 per cent of those who voted remained favourable to the European project (compared with a 45 per cent vote for the constitution) and according to a 2006 survey the vast majority (82 per cent) of the French population remained favourable to the European project.<sup>95</sup> While the 'long game' had been judged unsuccessful, this did not detract from a desire to play this game at European level and construct the ideal of a more social Europe.

In France, the 'non' of 2005 prompted a domestic response to those concerns that had been aroused in the national debate from, among others, France's new President when he

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92 PS meeting, Marseille, 31 March 2005. Cited in Ivaldi, "Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia."p.61.

93 Ibid.

94 Brouard and Tiberj, "The French Referendum: The Not So Simple Act of Saying Nay.", Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization."

95 Ipsos, 'Référendum 29 Mai 2005 : Le sondage sorti des urnes (exit poll)'. Also, Schmidt, "Trapped by Their Ideas: French Elites' Discourses of European Integration and Globalization."p.1003.

came to power in 2007. In negotiating the amendments to the constitutional treaty, Sarkozy declared triumphantly that he had managed to put an end to “competition as an ideology and dogma” in the EU.<sup>96</sup> This certainly overstated the concessions that Sarkozy was able or willing to extract in the process of the Reform Treaty (re)formulation; in practice, while the relocation of a clause referring to “free and undistorted competition” to protocol status might be of some consequence to competition law and facilitate state-aid practices,<sup>97</sup> it does not represent a “major reorientation of the Union’s objectives” as Sarkozy claimed.<sup>98</sup> Nevertheless, it is significant that Sarkozy felt the necessity to respond in such rhetorical fashion to the concerns associated with perceptions of a neo-liberal Europe. Since becoming President he has also invoked the *dirigiste* notion of ‘economic patriotism’ – closely connected, it would seem, to a ‘constitutional patriotism’ – and argued for a Europe “that does not submit itself to the pseudo-dictatorship of the market”.<sup>99</sup>

### *French Resistance within ‘Strategic Ambiguity’*

For all its resistant discourses, French policy towards EU(rope) has, in practice, been characterised by what Grossman calls ‘strategic ambiguity’.<sup>100</sup> While it has sought to

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96 The Economist, “France’s Hyperactive President: The Sarko Show,” 28 June 2007.

[http://www.economist.com/world/europe/displaystory.cfm?story\\_id=9407824](http://www.economist.com/world/europe/displaystory.cfm?story_id=9407824). Accessed August 2010.

97 Alan Riley, “The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law,” (Brussels: Centre for European Policy Studies, 2008). [http://shop.ceps.eu/download.php?item\\_id=1541](http://shop.ceps.eu/download.php?item_id=1541). Accessed June 2008.

98 Economist, “France’s Hyperactive President: The Sarko Show.”

99 Katrin Bennhold, “News Analysis: Is Sarkozy an Old Style Gaullist in Disguise?,” *New York Times* (5 July 2007), <http://www.nytimes.com/2007/07/05/world/europe/05iht-france.4.6515959.html>. Accessed August 2010.

100 Grossman, “Introduction: France and the EU: From Opportunity to Constraint.”

promote and preserve a 'statist-legal' cosmopolitan rationality of government it has, at the same time, reconciled itself to the imperatives of a market cosmopolitan government in order to maintain its influence in the EU and at the same time remain credible to capital or 'the market'. Such ambiguity is present in its recent policy preferences in the context of the financial and economic 'crises'. France has supported German calls for moves towards an economic governance that involves the reinforcement of the SGP (as noted, relaxed in 2005) that it has, as noted, persistently breached.<sup>101</sup> This is an apparent recognition of the need to adapt to the imperatives of the financial markets in the context of the ongoing sovereign debt crisis in the euro-zone, which concurs with the German's ordo-liberal conception of the importance of austerity measures. At the same time, both France and Germany have supported EU moves to (re)-regulate finance both within the EU and globally, in particular in the context of G20 meetings.<sup>102</sup> This represents an acknowledgement of the need to monitor and constrain 'systemic risk' in the financial sector in accord with an ordo-liberal rationality of government that concedes the need for market regulation. At the same time, through a proposed banks tax and possible transaction tax, such regulation might offer a means of redistributing wealth within the EU(ropean) economy in a manner consistent with a 'statist-legal' rationality.<sup>103</sup>

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101 France and Germany have proposed a reinforced SGP, with the inclusion of more robust sanctions on states that persistently breach its terms. They have also called for a closer co-ordination with the Broad Economic Policy Guidelines. Euractiv, "Merkel, Sarkozy Eye Watered-Down Economic Governance," (16 June 2010), <http://www.euractiv.com/en/future-eu/merkel-sarkozy-eye-watered-down-economic-governance-news-495213>. Accessed August 2010.

102 See, for instance, European Council, "Presidency Conclusions," (17 June 2010).

103 Euractiv, "Belgian EU Presidency to Push for Bank Tax Deal," (7 July 2010), <http://www.euractiv.com/en/financial-services/belgian-eu-presidency-to-push-for-bank-tax-deal-news-495898>. Accessed August 2010.

However, these rationalities have not always been so easily reconciled in recent times. France has, for instance, had important run-ins with Germany over the need for political solidarity (a *de facto political* constitution) in the euro-zone in the form of financial support for the struggling Greek economy. While Sarkozy consistently pledged support for Greece in the early stages of its sovereign debt crisis in 2010, a reluctant Merkel only did so having castigated an irresponsible Greece, placing pressure on its government to adopt harsh austerity measures. As a Reuters report put it, "[i]n Germany, abiding by the rules and pursuing budget frugality is vital [whereas] in France, the word austerity is banned from the political lexicon and deficits have become a way of life."<sup>104</sup> In this sense - and true to a 'statist-legal' rationality - France has remained a backer of a *de facto* substantive economic *government* and has been willing to countenance redistribution within the euro-zone; certainly the French have called for greater solidarity on the part of Germany. A recent Reuters report successfully captures the differences in current positions and the more fundamental divergences in French and German political economy in which these are rooted:

The word "government" gives the impression of an outside body that would dictate economic policy, whereas governance raises the prospect in German minds of creating structures, framework and sanctions..... At the heart of the problem are core contradictions between France and Germany over economic development, with no easy solutions in sight. Germany has undergone painful reforms to create a lean, efficient export machine that is creating unsustainable imbalances across the euro zone. While Germany is ratcheting up seemingly endless trade surpluses, many of its neighbors, including France, are building up multi-billion euro deficits. For Paris the answer is obvious -- Germany should boost domestic demand and cut

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104 Crispian Balmer, "Franco-German Engine Splutters over Greece," *Reuters* (4 May 2010), <http://uk.reuters.com/article/idUKLNE64303N20100504>. Accessed August 2010.



taxes to encourage imports. For Berlin, the answer lies outside its borders - other countries should simply copy it, primarily by lowering wages. French officials mutter in private that Germany, which does not have a minimum wage, is simply salary dumping. Germans say it is this solid economic management that they are proud of.<sup>105</sup>

The key point for present purposes is that in the context of a 'strategic ambiguity'<sup>106</sup> – not only in France, but in Germany and EU(rope) in general (see Conclusion) - it is certainly possible to identify in the contemporary situation the French tendency discussed throughout this chapter to resist the imperatives of a market cosmopolitan rationality through the assertion of a 'statist-legal' cosmopolitan rationality.

## Conclusion

This chapter has sought to elucidate a 'statist-legal' – specifically, a *European* - cosmopolitan rationality or governmentality as a possible counterpoint to the market cosmopolitan rationality presented as prevalent in and constitutive of European level government in Part I. It has done this via a discussion of Habermas's work on post-national government in general and Europe in particular, wherein he expresses his concern regarding the depoliticising impact of a neo-liberal non-politics. Such a governmentality is illustrated with reference to the efforts of French policy to oppose EU(rope) as a neo-liberal manifestation and its attempts to promote a social EU(rope).

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105 Reuters, "Economic Governance Divides France and Germany," *Reuters* (19 May 2010), <http://www.reuters.com/article/idUSTRE64I5YV20100519>. Accessed August 2010.

106 For more general discussion on the concept of ambiguity in cosmopolitan government, see Chapter 6 and Conclusion.

Like other cosmopolitan democrats, Habermas is concerned that a market cosmopolitan rationality – in particular, a neo-liberal governmental rationality discussed at length in Part I – is destructive of the conditions that permitted the realisation of autonomous self-determination and a genuinely inclusive deliberative consensus. Such conditions were manifest in the European welfare state that is currently under threat from forces of globalisation and a Europeanisation guided by neo-liberal precepts. According to Habermas, the revival of such conditions cannot take place at the level of the nation-state, precisely because of these processes, but a EU(rope) that embodies these social democratic principles might challenge the prevalence of a neo-liberal globalisation.

If nothing else, the rejection of the constitutional treaty by the French in 2005 speaks to the *possibility* of challenging or resisting the prevailing governing rationality in EU(rope). Such a political moment is an important popular contribution to the perpetuation of the discourse on social Europe, which ensures that a 'neo-liberal EU', broadly conceived, is never fully realised. Indeed, as discussed in Chapter 1 with reference to Foucault's genealogy, liberal government, or a market rationality, while constituting a power relation, also opens up and implies a certain space of freedom in which subjects are able to resist its subjectifying impact. In this case, a neo-liberal Europe's governing, subjectifying impact on a national field of government and the individuals that inhabit that field is never fully realised.<sup>107</sup> As we have said, liberal government is not only or always top-down, but also bottom-up to the extent that autonomy operates as its very

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<sup>107</sup> This is reflected in the continued pertinence of a varieties of capitalism literature.

condition. Liberal government is enjoined to let the market and the civil society within which it operates a space of uncertainty, which, ideally, from a market cosmopolitan perspective, is constitutive of enterprising, forward-regarding subjectivities. And yet, as noted in introduction and Chapter 1, this very space of uncertainty, or freedom, permits the emergence of discourses that question these very subjectivities. Within such a space a legal cosmopolitan 'subject of right' reasserts itself, as we have seen with reference to Habermas and certain French discourses towards EU(rope) (and as will be shown again in Chapter 6).

In this sense, the Chapter has demonstrated that a market cosmopolitan rationality is less constraining than a 'new constitutionalism' perspective of the sort offered by neo-Gramscians such as Gill might imagine. In theory, a liberal constitution may encompass far more than a neo-liberal rationality; indeed, it can be rooted in a 'subject of right' and formulated in accordance with more social democratic political preferences as Habermas's intervention demonstrates. In practice, as the case of French discourses illustrates, the space for resistance to neo-liberal rationalities granted by a democratic constitutionalism in the EU results in a legal, social and political reality which is not *wholly* neo-liberal, even where such rationalities may be considered excessively dominant.<sup>108</sup>

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108 Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'Social Europe' and 'Soft' Governance."

While this chapter has sought to primarily illustrate the possibilities of the theory/practice of a 'statist-legal' cosmopolitan government in relation to the market cosmopolitan rationalities discussed in Part I, it has also implicitly foreshadowed certain of the critiques or limitations of such a rationality, which are considered at length in Chapter 4. Indeed, the very designation 'statist-legal' is suggestive of both the conditions of possibility and subjectifying tendencies of such a rationality. As noted above, there is a tendency in cosmopolitan democracy of the sort associated with Habermas to reinvent the features of the nation-state beyond the nation-state in an attempt at promoting individual self-determination – the basis for a discourse ethic – beyond the nation-state. On the one hand, this endeavour aims at providing the (social) *security* required for self-determination that a market cosmopolitan government is perceived to have undermined and therefore seeks to nurture a subject of solidarity that is unconstrained by nation-state boundaries and thereby constitutive of such security via their participation in a social-contract or constitution. However, on the other hand, the very designation of such a solidarist post-national 'citizen' and an associated 'constitutional patriotism' cannot be entirely delinked from the requirements of cultural affinity which must be re-made beyond the state or, in Habermas's case, in the EU(ropean) context. In other words, a political constitutional settlement beyond the nation-state requires the establishment of a cultural solidarity. In Habermas's case a European identity is therefore the condition of possibility for his vision of post-national solidarity. As discussed in the following chapter – again with reference to Habermas's theory and French discourses – a 'statist-legal' cosmopolitan rationality may simply reinvent many of the ethical closures associated with nation-state of which a range of post-war neo-liberals (discussed in Part I) were so acutely aware.

## Chapter 4: Securing Legal Cosmopolitan Government I: 'Social Europe' and its Others

### Introduction

In this chapter I will reflect upon the ways in which a 'statist-legal' cosmopolitan government of the sort enunciated in Chapter 3 is rendered possible or secures itself through the promotion of particular subjectivities. As noted in Part I, a market cosmopolitan rationality also requires securing – the promotion of particular subjects or conditions of possibility – and in the extant practices of security in/of EU(rope) market and legal rationalities combine, often in confused and confusing ways. The ambiguities in this relationship are discussed in some detail in Part III and mentioned in passing throughout this chapter. However, in accordance with the Habermasian rationality under consideration, this chapter is primarily interested in teasing out those practices aimed at the security of justice (or a 'social' Europe) at EU level; it elucidates the particular subjectivities promoted by this 'statist-legal' cosmopolitan government. In order to emphasise this aspect of securitising EU practices, the chapter again draws on French discourses on EU(rope), which, it will be argued, have often sought to generalise 'statist-legal' priorities from the domestic to the European level of government. In particular, it is argued that such a rationality – and its associated generalisation of a social democratic constitution to EU(rope) - requires the establishment of a solidarist (neo)-republican *citizenry* with some cultural affinities. This implies the constitution and promotion of a delimited political space – a public sphere or *demos* – in EU(rope) and a

collective European identity as (neo)-republican citizenship. Deploying insights from Foucault's evocatively entitled lecture series, "Society Must Be Defended", the chapter highlights the corresponding requirement to exclude particular identities or subjects in the very constitution of a *European* cosmopolitan space. As a critique of Habermas's prescriptions and French discourses demonstrate, such (potentially violent) exclusions lie unacknowledged at the heart of the ostensibly irenic theory and practice of a 'statist-legal' cosmopolitan government. Indeed, such a rationality reproduces the potential violences of nation-state that a host of critical scholars have highlighted.

This chapter offers, then, what I termed in Introduction, an *embedded critique* of cosmopolitan democracy. It considers the *conditions of possibility* and *subjectifying effects* of Habermas's critique. Through its engagement with Habermas's theory and French discourses on such issues as immigration and enlargement, it vividly animates the potential ethical difficulties involved in pursuing the ideals associated with a Habermasian vision of EU(rope). It highlights that the *sine qua non* of a "statist-legal" rationality is Foucault's injunction that 'society must be defended', along with those citizen-subjects that are its very condition of possibility. In practice – in particular, in the context of the broader biopolitical endeavour discussed in Introduction and Part I, that is concerned with promoting the welfare of a particular *population* - such a *defensive necessity* can manifest in policies that are violently exclusionary. In this regard, the chapter also raises important questions in relation to an IR and security studies theory that draws a sharp distinction between a 'normal' politics within the liberal constitutional state and an 'exceptional' politics at the limit. An ostensibly exceptional politics may be the condition of possibility of a so-called normal politics – in our case a specifically 'statist-legal'

cosmopolitan government – and in that sense the very division between the terms arguably collapses. As Foucault notes in his reversal of Clausewitz's famous dictum, from certain perspectives, *politics is the continuation of war by other means*.

The first section focuses on Habermas' own attempts to construct a European demos or community, which, he himself concedes, is the very condition for the realisation of his particular vision of post-national politics. The second section turns to some of the potential policy effects of such a governmentality, again drawing on French policy towards Europe as embodying an archetypically Habermasian approach. As argued in Chapter 3, French actors have, in some senses, embodied a Habermasian legal cosmopolitan governmentality as far as their policy towards the EU is concerned. Although the same caveats as those enunciated in the previous chapter apply - namely, that a host of other member state agendas and alternative actors might have been drawn upon in order to describe these consequences – a focus on French discourse nevertheless permits the elucidation of an array of exclusionary and assimilatory agendas promoted by agents within this context. In short, it allows for an appreciation of the potential ethical consequences of the designation of a European citizen in substantive terms; to consider the other side of the coin of a more social EU(rope). In particular, it highlights French opposition to the 'Polish plumber' in the context of the so-called 'Bolkenstein directive', which was one of the factors that prompted the French 'non' of 2005; French opposition to Turkey's bid for EU membership and France's attempts to promote an approach to immigration at European level which draws on its own *contrat d'intégration*. Drawing on Foucauldian insights - particularly from Foucault's aforementioned lecture series – the third and final section offers a general critique of a governmental rationality

rooted in the desire to promote a juridical-constitutional consensus or settlement. It argues that contrary to an irenic intent, the ontological universalism that underlies such a position can tend to the effacement of difference in general and in EU(rope) in particular; indeed, perhaps ironically, the spectre of a potentially violent sovereignty lurks in close proximity to the cosmopolitan democratic endeavour.

### **Constructing a *European* Constitutional Patriotism**

#### *Conceiving a Constitutional Moment*

The paradox in Habermas's position is that any policy moves in the direction he favours – including the establishment and content of a European constitution and more social and democratic Europe - would seem to be a divisive issue for many Europeans and a number of elected European governments, as reflected in referenda and political debate in recent years. Indeed, we might concur with Grimm that Europe lacks a 'constitutional moment'<sup>1</sup>; we might wonder, as does Habermas with reference to Polanyi, whether a 'great transformation' and the consensus it requires will be possible in the absence of a catastrophe of the sort which led to the post World War II embedded liberal order. Habermas's theoretical emphasis on consensus, as well as his own critique of the precipitous nature of German reunification in one sense makes the urgency of his own

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1 Dieter Grimm, "A Great Innovation of Our Times: As a Worldwide Recognized Role Model, Europe Does Not Need a Constitution," in *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War*, ed. Daniel Levy (Verso, 2005).



call for a European constitution in the absence of widespread popular support somewhat surprising.<sup>2</sup> For Habermas, it may be that the contingent need to rescue the social democratic ideals of the nation-state from obsolescence simply outweighs any legitimacy foibles.<sup>3</sup> In particular, the continuation of a maximalist European project – *contra* a retreat to the shell of the nation-state – may, according to an optimistic prognosis, help to cement the constitutional patriotism he favours.<sup>4</sup>

More fundamentally, there is a paradox or aporia in the relationship between constitutionalism and democracy that is not fully recognised in Habermas's theory of co-originality; while each might represent the condition of possibility for the other, at the same time, each represents the condition of impossibility. Thomassen's Derridean deconstruction of the co-originality theory (see Chapter 3) highlights the way in which Habermas's introduction of the 'fiction' of an 'original [constitutional] condition' where 'persons freely enter into a constitution making practice' – or, simply, a discourse theory or ethic – seeks to overcome this problem, but at the same time paradoxically predetermines the act of constitution making or political will formation in introducing the constitution before the democracy.<sup>5</sup> It potentially closes the space for autonomy through seeking to constitute its priority. Concretely, it can be said that the constitution

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2 Pensky, "Universalism and the Situated Critic." 83-5. In this regard, it is interesting to contrast his approach to the practice of European government with some of the deliberative theorists who draw on his discourse ethic (see Part III).

3 Habermas, "Why Europe Needs a Constitution." Boon and Delanty, "Cosmopolitanism and Europe: Historical Considerations and Contemporary Applications."

4 Turner, "Jürgen Habermas: European or German?."

5 Habermas, cited in Lasse Thomassen, "A Bizarre, Even Opaque Practice: Habermas on Constitutionalism and Democracy," in *The Derrida-Habermas Reader*, ed. Lasse Thomassen (Chicago: University of Chicago Press, 2006). 188

is either imposed *or subjects are identified, constructed or imagined* such that it no longer seems like an imposition but a legitimate consensual outcome.

Perhaps because of the obvious lack of consensus – either among governments or citizens – Habermas demonstrates an awareness of the need to *identify or construct* at least some notion of community or solidarity at the European level. There is a tension here between the moral geography of a constitutional patriotism, which he perceives within certain European nation-states and particularly Germany, and the extension of such a patriotism to a cosmo-polis or the EU post-national space, where a nationalist patriotism is certainly still relevant.<sup>6</sup> In accordance with his discourse ethic, the constitutional rights which might inspire a constitutional patriotism must be put in place via a process of democratic will formation and, correspondingly, those rights must allow for the process of will-formation in the first place. In concrete terms, this means that the principles of constitutional democracy, if they are themselves to be democratically legitimate, must be actualised in the particular institutional forms to which a particular community has granted legitimacy.<sup>7</sup> Hence, the notion of constitutional patriotism, while rooted in ostensibly universal principles, itself relies on some notion of cultural closure, of defining a self and other, insiders and outsiders. Habermas acknowledges this himself:

Any political community that wants to understand itself as a democracy *must at least distinguish between members and non-members*....Even if such a community is grounded in the universalist principles of a democratic constitutional state, it still forms a collective identity, in the sense that it

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<sup>6</sup> Ibid. Turner, "Jürgen Habermas: European or German?."

<sup>7</sup> Fine and Smith, "Jürgen Habermas's Theory of Cosmopolitanism."

interprets and realizes these principles in light of its own history and in the context of its own political form of life.<sup>8</sup>

Habermas refers here to the importance of collective identity in terms of the interpretation and realization of universal principles, but it seems clear that such an identity is also central to the formulation of these very principles. Hence, the act of democratic legitimation is presupposed by an act of defining the demos; in this context, defining citizens or defining member nation-states. Despite his cosmopolitan ambitions, Habermas, like Kant, is therefore sceptical that a world community could be formed which might adhere to a common constitutional patriotism. However, he does not fall back on a commonwealth of states, which would be problematic for the reasons associated with economic globalisation discussed in Chapter 3. Instead he perceives in Europe the possibility to establish a community beyond the nation-state which might come to share a collective identity and which, in turn, might allow it to interpret and institutionalise its democratic constitutional principles in a common way.

As discussed in Chapter 2, we might note, in accordance with Manners' conception of a 'normative power Europe'<sup>9</sup>, that certain liberal democratic principles are in fact already enunciated in European Union treaties, fleshed out in agreements such as the Charter on Fundamental Freedoms or, in a different institutional context, the ECHR. Furthermore, the actualisation and interpretation of these principles sometimes takes place in shared institutional contexts, such as the ECtHR, and even when it does not, national courts may

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8 Habermas, *The Postnational Constellation* p.107.

9 Manners, "Normative Power Europe: A Contradiction in Terms?."

increasingly refer to international conventions or jurisprudence.<sup>10</sup> The centrality of universal human rights, which do not depend on the laws of the nation-state, also extends to public discourse throughout European society. Thus, we might say that a European public sphere<sup>11</sup>, based on a common legal cosmopolitan conception of human rights, is, to some extent, emerging both globally and, particularly, in Europe. Related to this, a European civil society – in the loose sense of civil society defined by theorists of ‘global’ civil society – might be emerging, which seeks to defend certain of these rights and is manifest, for example, in the European Social Forum and in the context of an array of policy specific campaigns.<sup>12</sup> As discussed at length in Part III, this civil society is also recognised in the EU, particularly by the Commission and Parliament, which actively attempt to include it in government. In short, it may be that the requisite common identity for the generalisation of a constitutional patriotism is at least immanent in contemporary Europe.

More generally, from a social theory perspective, it might be noted that processes and interventions, whether old or new, have at various times fostered what Beck et al. call a ‘cosmopolitan outlook’ in Europe to the extent that they have promoted a horizontal

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10 See for example, Kate Nash, "Out of Europe: Human Rights and Prospects for Cosmopolitan Democracy," in *Cosmopolitanism and Europe*, ed. Chris Rumford (Liverpool: Liverpool University Press, 2007).

11 Habermas founded the concept of a ‘public sphere’ which refers to “a realm of social life in which something approaching public opinion can be formed.” It is a sphere in which citizens can “confer in an unrestricted fashion – that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions – about matters of general interest” It should be noted that public opinion is here distinct from opinion based on tradition or culture. Held, *Introduction to Critical Theory: Horkheimer to Habermas* p.260.

12 Chris Rumford and Gerard Delanty, *Rethinking Europe: Social Theory and the Implications of Europeanization* (Routledge, 2005).

exchange of social, cultural and linguistic practices or a 'cross fertilization' of identities.<sup>13</sup> The existence and ongoing expansion of EU(rope) may have facilitated such processes; indeed, in many ways processes of integration and enlargement stand as a testament to the transience of the EU's spatial and cognitive boundaries, which might be contrasted with the reification of the nation-state.<sup>14</sup> Whilst it is important to acknowledge – as we have, in Chapter 1 - that the social processes which permit peaceful relations or a 'cross fertilization' might frequently be the latent or even unwanted side-effects of the globalisation or Europeanisation of markets, they may also, *sometimes and in some places*, result in a *conscious* shift in outlook.<sup>15</sup> In other words, a social change involving the emergence and development of a self-reflexive cultural and political subjectivity that supports a nascent public sphere and is compatible with the emergence of a constitutional settlement which extends beyond fundamental freedoms to encompass the social and economic rights of the sort espoused by Habermas.<sup>16</sup>

Conversely, we might ask whether these relatively weak conceptualisations of public sphere and civil society are sufficient to provide a consensual basis from which we might be able to *legitimately* build a common constitutional patriotism – and substantive social EU(rope) - of the sort Habermas seems to advocate. There may exist a public sphere which transcends the nation-states of the EU, but we could ask whether this, in concrete

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13 Beck and Grande, *Cosmopolitan Europe*, Boon and Delanty, "Cosmopolitanism and Europe: Historical Considerations and Contemporary Applications."

14 Jan Zielonka, *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, Routledge Advances in European Politics (London: Routledge, 2002).

15 Ulrich Beck, *Cosmopolitan Vision* (Cambridge: Polity Press, 2006).

16 Rumford and Delanty, *Rethinking Europe: Social Theory and the Implications of Europeanization*.

terms, constitutes a distinctly *European* public sphere.<sup>17</sup> There is no common language, no significant transnational media in Europe and only rather limited transnational European political groupings and interest coalitions exist in this context.<sup>18</sup> Freedom of movement and associated EU citizenship rights are invoked by relatively few despite efforts at promoting mobility. Indeed, this absence of a public sphere may explain the feeling of distance from the Brussels polity experienced by many citizens of European states and their sense that policy is being made beyond their reach or control. The local realities of the 'static masses' may not always be fully appreciated by a 'mobile elite' and, perhaps, above all, Europe's Brussels-based officialdom.<sup>19</sup> The same kind of accusation could be levelled at optimistic cosmopolitan pronouncements on the possibility to achieve a substantive public sphere or communication in a common language (usually English).<sup>20</sup> While some, such as Etienne Balibar, have placed much hope in the promotion of a polyglot citizenry via education as the basis of a genuinely active European public sphere, the inroads made in this respect by existing EU schemes cannot realistically be considered to have reached 'the static masses' and the question of how this might actually be achieved remains moot.<sup>21</sup>

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17 Gerard Delanty and Chris Rumford, *Rethinking Europe: Social Theory and the Implications of Europeanization* (Oxon: Routledge, 2005).

18 See Barrie Axford and Richard Huggins, "The European Information Society: A New Public Sphere?," in *Cosmopolitanism and Europe* ed. Chris Rumford (Liverpool: Liverpool University Press, 2007).

19 See Paul Jones, "Cosmopolitanism and Europe: Describing Elites or Challenging Inequalities?," in *Cosmopolitanism and Europe* ed. Chris Rumford (Liverpool University Press 2007).

20 See, for example, Daniele Archibugi, "The Language of Democracy: Vernacular or Esperanto? A Comparison of the Multiculturalist and Cosmopolitan Perspectives," in *Cosmopolitanism and Europe* ed. Chris Rumford (Liverpool: Liverpool University Press, 2007).

21 Balibar, "Europe as Borderland."

Moreover, as highlighted in Chapter 2, the processes through which integration has actually taken place are notable for the fact that they do not involve a deliberative aspect which involves a plurality of Europeans. To the extent that non-governmental actors do have influence, it is often argued that there has been a significant, sometimes monopolistic, influence of private economic interests as compared to the relatively marginal, usually oppositional, role of public interest civil society actors.<sup>22</sup> Such critiques also apply to more pluralistic or participatory legal cosmopolitan approaches, as discussed in Part III. While, in his early work, Habermas refers to the constitutive nature of capitalism on the public sphere and civil society historically<sup>23</sup>, he is clear that its role should be divorced from capital interests: "civil society, which provides the social underpinning of autonomous publics, is as distinct from the economic system as it is from the state".<sup>24</sup> And elsewhere: "civil society is constituted by voluntary unions outside the realm of the state and the economy ranging from churches, cultural associations, and academies to independent media, sport and leisure clubs, debating societies, groups of concerned citizens, and grass-roots petitioning drives all the way to occupational associations, political parties, labour unions and 'alternative institutions'".<sup>25</sup> In reality though we might doubt the presence of both a substantive public sphere and a civil society capable of championing 'solidarity' in the face of what Habermas refers to as

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22 See, for example, Deidre Curtin, "Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance," *Social and Legal Studies* 12, no. 1 (2003). See also the work of the NGO ALTER-EU (The Alliance for Lobbying Transparency and Ethics Regulation) - <http://www.alter-eu.org/>. Accessed August 2010.

23 As Calhoun puts it, "[t]he new sociability, together with the rational-critical discourse that grew in the salons (and coffee houses and other places), depended on the rise of national and territorial power states on the basis of the early capitalist commercial economy. This process led to an idea of society separate from the ruler (or the state) and of a private realm separate from the public." Calhoun, *Habermas and the Public Sphere*. p.7

24 Habermas, *Inclusion of the Other: Studies in Political Theory*. p.249.

25 Further reflections on the public sphere, in Calhoun pp.453-4.

the resources of 'money' and 'administrative power'.<sup>26</sup> Thus, the political control that Habermas seems to advocate for EU(rope) may not be easily achieved, at least not according to his own democratic principles.

Of course, the 'administrative power' of member states in reinforcing a nation-centric political imagination might be co-constitutive of the very 'passivity' of a European people. Referring to debates surrounding the constitution, Balibar notes that,

[T]he ruling elites will tend to control these debates; they will ensure a complete isolation of the discussions and the clashes within the borders of the different countries and languages, which is a way to immunize the already established supranational structures against their consequences. And they will be helped to do so by the 'passivity' of the masses, who either do not believe in the possibility of crossing the borders or view it as an alienating process, a process of dispossession of their political status. This, given the subject of the debate, is a paradox.... But it is more than a paradox: a 'performative contradiction' or a practical refutation of the objective of building a new common public sphere. How could such a space be common, hence, public, without a circulation of ideas, discourses, speakers, and a flow of translations? We are thus in a dead end, in the middle of the contradiction, voting and acting in a formally transnational but materially split, entirely partitioned political space.<sup>27</sup>

The point seems to be that discussions of the government or purpose of Europe are still very much framed within a nation-centric imaginary of citizenship, which is shared by elites and the people alike. This might beg the question, how did the European project get to where it is? As we noted in Chapter 2, one answer might be that it was an elite(ist) project from the outset, which has developed at moments when certain elite interests

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26 Habermas, *Inclusion of the Other: Studies in Political Theory*.

27 Balibar, "Europe as Borderland."



converged. This answer to the question may, of course, be only partially true for the reasons highlighted above, but it does render far less shocking the French 'non' of 2005 (and, for that matter, the Dutch and Irish rejections of the constitutional and Lisbon treaties respectively). It might also explain Balibar's sense that 'we are in a dead end' or the far more widespread cries of 'democratic deficit'.

### *Securing a European Cosmopolitanism*

Given such prevailing realities, we might think that Habermas's assertion regarding the possibilities for a democratically achieved constitutional patriotism in Europe is somewhat optimistic. However, as he notes, the solidarity that we may associate with the nation-state is itself based largely on an imagining of community, a process of social construction.<sup>28</sup> Habermas's article (co-signed by Jacques Derrida) which appeared in the German newspaper *Frankfurter Allgemeine Zeitung* in May 2003 following the commencement of the war in Iraq and the many protests from European publics that immediately preceded it, can be read as a pragmatic attempt to contribute to the construction of a European public sphere and, ultimately, some thin notion of a common community. Indeed, in the process of describing the distinctiveness of Europe and discerning the emergence of a public sphere, Habermas is engaged in an act of simultaneously celebrating and wishing into existence a common secular, social-democratic identity: indeed, it seems clear that he wants us to relate to the ideals he

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28 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), Habermas, *The Postnational Constellation*

identifies as distinctly European. Habermas is engaged in an experiment which fits with his conception of deliberative democracy and communicative action; the print media as burgeoning European public sphere is deployed in order to set up a pan-European debate on Europe in the light of the war in Iraq. Indeed, he organised the publication of a number of articles on similar themes by leading intellectuals in newspapers across Europe during the same period.<sup>29</sup> In this context Habermas grants himself significant license to offer up a celebratory and rather polemical vision for Europe; this is why, following Levy et al, we might refer to it as his 'manifesto'.<sup>30</sup> It is marked by a far more politically engaged or even activist tone than his other writing on Europe and one which is less reflexive towards the claims he makes than he might be in other contexts.

Although in the manifesto Habermas continues to eschew a culturally essentialist line which appeals to religion or a substantive European identity, he discerns in the moment of protest against war in Europe the emergence of a European public sphere, which, as mentioned above, is a critical element in the formation of a deliberative democracy at the European level. He also cites a number of concrete characteristics which bind Europe together, including its secularism, trust in the state, scepticism vis-à-vis markets, preference for the welfare state, multilateralism in international affairs and reflexivity towards others.<sup>31</sup> Habermas may not go as far as certain European politicians who

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29 See the collection of articles in Daniel Levy, Max Pensky, and John Torpey, eds., *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War* (London; New York: Verso, 2005).

30 Ibid.

31 Habermas and Derrida, "February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe."

perceived in this political moment the birth of a "European nation"<sup>32</sup>, but he does present a vision of Europe as bound in a number of important normative ways. Of course, Habermas is aware that the European scene preceding the Iraq war can also be read as demonstrating the very important political cleavages between member states within the EU and this is why the article is above all a '*plea* for a Common Foreign Policy' which is seen as a critical part of the construction of Europe; in other words, a common, consensus based, outward gaze.

In practice there has, of course, been a large degree of complicity between Europe and the US which remains unaddressed in the manifesto. Habermas's wish for a common foreign policy as a counterpoint to the US is not being realised and the ruptures between the US and the few opposing EU governments over the Iraq war were in practice short-lived. Moreover, we might note the ways in which European governments, both individually and through the EU, are engaged in the promotion of security discourses, similar to those adopted in the US.<sup>33</sup> European elites almost unquestioningly accepted the rhetoric of a 'war on terror', and what Butler calls the *perpetual state of emergency* that it permits.<sup>34</sup> Concretely we might cite, *inter alia*: the enactment of legislation in EU member states, which undermines civil liberties just as the Patriot Acts and other measures have done in the US; European governments' assistance in the CIA's extraordinary rendition flights; or the willingness of the European Commission to allow US authorities to access and record

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32 Levy, Pensky, and Torpey, eds., *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War* xvi

33 See, Maria Rovisco, "Cosmopolitanism, Collective Belonging and the Borders of the European Union," in *Cosmopolitanism and Europe*, ed. Chris Rumford (Liverpool University Press 2007).

34 Judith Butler, *Precarious Life* (Verso, 2004).

Europeans' personal data. Even more pointedly, Goede has convincingly argued with reference to EU anti-terrorist legislation - particularly in relation to the criminalisation of terrorist support, data retention, and asset freezing - that the EU "is world leader rather than reluctant follower"; indeed, a politics of pre-emption and its pernicious side effects have been central to EU practice and in these areas it becomes difficult to draw a geopolitical dividing line between EU and US in terms of governing practices.<sup>35</sup>

Moreover, as evidenced in other of his works, described in the previous chapter, Habermas is aware that the reality of a 'market Europe' may not fit with the far more social democratic principles he contends in his manifesto define an idealised European society. Perhaps such a recognition is why, ultimately, both a common foreign policy and a coalescence around these principles more generally must, for Habermas, begin in a 'core' Europe – essentially the founding members which opposed the Iraq invasion and particularly the Franco-German axis - where there is arguably a greater consensus around the characteristics he both describes and favours (although even here it is in reality limited as we saw in the preceding chapter with reference to monetary policy and as we see in the context of recent debates over responses to the sovereign debt 'crisis').

One of the main contentions that critics have with the manifesto is the way in which it simultaneously idealises Europe and 'others' or even 'orientalises' a number of others, particularly the US, but also those not in the 'core' and especially the aspiring EU

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35 Marieke de Goede, "The Politics of Preemption and the War on Terror in Europe," *European Journal of International Relations* 14, no. 1 (2008). p.162.

member states in the East of Europe.<sup>36</sup> Despite the description of Europe as a place where "a reciprocal acknowledgement of the Other in her otherness"<sup>37</sup> is possible, Habermas's own subjectification of Europe is highly idealised and his characterisations of certain 'others' is based on often crude and selective observations. As noted, it is questionable whether the characteristics he describes as distinctly European are accurate, exhaustive, or, more fundamentally, whether such ideals can accurately be associated with what is in his formulation a spatial or geographical entity. His notion of a core Europe is perhaps an effort to rectify this problem by narrowing the scope of his moral geography, but even if this were to improve the empirical validity of his list of values, then we should be clear that we are no longer talking about Europe – indeed, not even the states of the current 27-member European Union. Critiques of Habermas's article are similar to many of those aimed at Manners' 'normative power Europe', which also risks constructing "an identity of the EU against an image of other in the 'outside world'".<sup>38</sup> It is implied that the experiences of countries seeking to join – notably, at the time the article was written, Eastern European states – are somehow less valid or not as relevant to the process of identity formation; perhaps because they are not yet in the Union they are somehow less European. As Neumann notes, Europe has a long history of defining itself in contrast with various Eastern others, and Habermas's polemic seems to, probably inadvertently,

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36 See, for example, Volker Heins, "Orientalising America? Continental Intellectuals and the Search for Europe's Identity," *Millennium: Journal of International Studies* 34, no. 2 (2005).

37 Habermas and Derrida, "February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe."

38 Diez and Steans, "A Useful Dialogue? Habermas and International Relations." p.614.

contribute to this legacy.<sup>39</sup> We might, moreover, wonder what place there might be for Islamic Turkey in the exclusivist moral geography he draws.

In his manifesto Habermas seems to wish into existence particular subjectivities that might endorse and enact his values for EU(rope); his is a strategy that aims to render a *European* population that embodies an ethic of solidarism, consensus or, ultimately, peace. Indeed, it can be regarded as a strategy of *territorialisation*. As Balibar says,

...to 'territorialize' means to assign 'identities' for collective subjects within structures of power, and, therefore, to categorize and individualize human beings... [T]he figure of the 'citizen' ... is exactly a way of categorizing individuals. Such a process is possible only if other figures of the 'subject' are violently or peacefully removed, coercively, or voluntarily destroyed.<sup>40</sup>

In the following section I wish to interrogate the territorializing implications of this 'Habermasian governmentality' in the European context, with reference to certain French discourses. I seek, then, to understand what Habermas's 'members' or European citizens might look like? In other words, which subjectivities does a 'statist-legal' cosmopolitan rationality seek to produce? How does it produce them? How does it designate and deal with non-members? How and when does it look to assimilate or integrate them? And how and when does it exclude them?

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39 Iver B Neumann, *Uses of the Other: The East in European Identity Formation* (Minnesota: University of Minnesota Press 1999).

40 Balibar, "Europe as Borderland." p.192.

## Securing the European *Demos* in/ through French Policy

Much of contemporary French policy and discourse can, I would suggest, be characterised as embodying what Habermas calls a 'constitutional patriotism' or what might also be referred to as a (neo-)republicanism. Just as Habermas's vision of a European constitutional settlement in opposition to a neo-liberal Europe must ultimately ground itself in the definition of substantive community, so, in far more explicit fashion, does President Sarkozy's. As he states in his presidential manifesto:

L'Europe est d'abord une grande culture. Elle doit agir dans le monde pour que les *valeurs de la civilisation* ne cèdent pas sous la pression des seuls intérêts commerciaux et financiers.... L'Europe ne doit pas se résigner aux délocalisations, mais au contraire tout faire pour que l'activité se localise en Europe. C'est ce que nous ont dit ceux qui ont voté non au référendum sur le projet de Constitution [Constitutional Treaty vote of 2005]. C'est un fait politique. Je veux leur dire que je les ai entendus.<sup>41</sup>

While I would not suggest any explicit political affinity between them, Sarkozy here pitches a common European identity against the disintegrative tendencies of the market in a not dissimilar fashion to Habermas. In the same manifesto he states that, "[s]i je suis élu, je ne cesserai d'affirmer notre fierté d'être français".<sup>42</sup> Habermas may well feel

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41 Nicolas Sarkozy, "Mon Projet: Ensemble Tout Devient Possible," (sarkozy.fr, 2007). p.9 My translation: Europe is, above all, a great culture. It must act in the world so that the values of civilisation do not succumb to the pressure of commercial and financial interests... Europe must not resign itself to delocalisations, but, on the contrary, do everything possible to ensure that [economic] activity is located in Europe. That is what those who voted no at the referendum on the constitutional treaty told us. It's a political fact. I want to let them know that I heard them.

42 Ibid. My translation: If I am elected, I will not cease to affirm our pride to be French.

uncomfortable with such assertions of national pride, particularly given his own apparent desire to assert a distinctly *post-national(ist)* German identity. However, as Sarkozy also states, this pride or patriotism is rooted in the idea that the French are “uni par les droits de l’homme et nos valeurs républicaines.”<sup>43</sup> Such pride is, then, it could be argued, not an act of chauvinism, but a reflection of a very Habermasian constitutional patriotism and therefore a pride which could be (and, in French rhetoric, frequently *has been*) extended to the European level or beyond. This is a patriotism which, as described in Chapter 3, is rooted in a strong belief in a socialising role of the nation-state, which embodies and provides a universal set of rights and responsibilities.

In accordance with such rationalities, French policy has, to a large extent, emphasised the importance of active citizenship in the domestic sphere and assimilatory integration policies in this context.<sup>44</sup> It has, for example, been historically hostile towards policies which recognise and promote national minorities and languages, preferring to emphasise the unity of French nation and identity around a set of ‘universal’ principles.<sup>45</sup> This is reflected *inter alia* in France’s declaration that Article 27 of the UN Convention on Human Rights, pertaining to minority rights, “is not applicable so far as the Republic is concerned” and in its unique failure among Council of Europe members to sign the

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43 My translation: united by human rights and our republican values.

44 For a thorough description of the philosophical underpinnings and inspiration of French integration policies, see Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain*.

45 ECRI, “Third Report on France,” (Strasbourg: Council of Europe, European Commission against Racism and Intolerance, 24 June 2004). [http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle\\_03/03\\_CbC\\_eng/FRA-CbC-III-2005-3-ENG.pdf](http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/FRA-CbC-III-2005-3-ENG.pdf). Accessed August 2010. See also, UN, “Press Release: UN Expert on Minority Issues Calls for Committed Leadership to Promote Non-Discrimination, Equality and Diversity in France,” (United Nations, 1 October 2007).

<http://www.unhchr.ch/hurricane/hurricane.nsf/0/49B43000A728B2E8C12573670070D37F?opendocument>. Accessed August 2010.



Framework Convention for the Protection of National Minorities. It is also reflected in its historical refusal to collect data regarding the ethnic or racial origins of French citizens<sup>46</sup> and, perhaps most famously, its principle of *laïcité* (a strict separation of religion and state), which has in recent times led *inter alia*, to restrictions being placed on the wearing of the Islamic headscarf and other religious symbols in schools.<sup>47</sup> Political upheaval in recent years, particularly a series of riots in late 2005, has certainly brought into question the effectiveness of the French republican ideal. The ideal has translated into official non-recognition of national and ethnic minority identities in France – and a consequent refusal to promote *positive* discrimination - while, in practice, widespread discrimination against such groups takes place.<sup>48</sup> If a juridical discourse is geared towards the effacement of difference, perhaps in no developed liberal democracy is this more apparent than in France, with its longstanding legacy of pacifying internal factions through the projection of unity.<sup>49</sup>

As suggested in Sarkozy's words, French elite and popular discourses on European level government have, perhaps unsurprisingly, mirrored to a large extent its internal politics;

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46 See Favell, *Philosophies of Integration : Immigration and the Idea of Citizenship in France and Britain*. p.7. In 2009 plans to collect data on ethnic and racial minorities were mooted. The controversy that these plans stirred is illustrative of the determination to conceive France and the French as a political unity and the hostility of any form of categorisation, which is associated by many with France's colonial past and Vichy rule. It is notable that even anti-discrimination organisations have campaigned against the collection of such data because of its potential to be used in a manner that might increase rather than reduce discrimination. For an account of the controversy, see, "France's Ethnic Minorities: To Count or Not to Count," *The Economist* 26 May 2009. [http://www.economist.com/displaystory.cfm?story\\_id=13377324](http://www.economist.com/displaystory.cfm?story_id=13377324). Accessed August 2010.

47 John R. Bowen, "Muslims and Citizens: France's Headscarf Controversy " *Boston Review* February/March (2004), <http://www.bostonreview.net/BR29.1/bowen.html>. Accessed August 2010.

48 Henri Astier, "French Muslims Face Job Discrimination," *BBC News Online* (2 November 2005), <http://news.bbc.co.uk/1/hi/world/europe/4399748.stm>. Accessed August 2010.

49 Foucault discusses this with reference to revolutionary France and, in particular, the role of the third estate in transforming a revolutionary discourse into a pacifying discourse that constituted the nation-state. Foucault, *"Society Must Be Defended" Lectures at the Collège De France, 1975-76*.

a discourse, in other words, which promotes Mitterand's abovementioned notion of *l'Europe notre patrie*. As in Habermas's work on Europe, there has been a frequent tendency to promote Europe as the *demos* or community within which the neo-republican values embodied in the 'universal state' might be re-asserted and realised.<sup>50</sup> Certain of the tendencies identified in relation to Habermas's moral geography have been reflected in French policy and public discourse on Europe. It is notable, for example, that Habermas's manifesto responses to the war in Iraq were reflected in the French government's promotion of an anti-war European position and prominent anti-American discourse from around 2003, which was, of course, famously reciprocated in the form of anti-French sentiments in US policy and society.<sup>51</sup> Habermas's ostensible exclusion of new member states from the 'core' was similarly an echo – albeit in less derogatory terms – of President Chirac's famous chastisement of the then prospective member states of Eastern Europe for supporting the US war in Iraq in early 2003, whose behaviour he characterised as 'reckless' and 'infantile'.<sup>52</sup>

In order to provide what I have called an *embedded critique* of the subjectifying and exclusionary tendencies of a 'statist-legal' cosmopolitan government – or a Habermasian

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50 Although it should be highlighted that this is not a unique or entirely coherent tendency, as French sovereignty is still frequently guarded in terms of its relations with Europe. This section emphasises the aspects of French policy which are consistent with the Habermasian perspective on Europe, although French policy is, in reality, characterised by much greater ambiguity than this would suggest. See, for instance, Grossman, "Introduction: France and the EU: From Opportunity to Constraint."

51 For example, on March 11, 2003, Representatives Robert W. Ney (R-Ohio) and Walter B. Jones, Jr. (R-North Carolina) banned all references to French fries and French toast on the menus of the restaurants and snack bars run by the House of Representatives. Cafeterias had to rename French fries to 'freedom fries'. See, Sean Loughlin, "House Cafeterias Change Names for 'French' Fries and 'French' Toast," *CNN Online* (9 February 2003), <http://www.cnn.com/2003/ALLPOLITICS/03/11/sprj.irq.fries/>. Accessed August 2010.

52 Ian Traynor and Ian Black, "Eastern Europe Dismayed at Chirac Snub," *The Guardian* (19 February 2003), <http://www.guardian.co.uk/world/2003/feb/19/iraq.france>. Accessed August 2010.

cosmopolitan democracy - I turn below to consider examples of two specific cases of French policy on Europe in greater detail: first, French discourses on EU immigration policy are considered via an analysis of the French EU Presidency's 'European Immigration Pact' initiative; and second, French scepticism vis-à-vis EU enlargement policy is considered via its manifestation in the now infamous 'Polish plumber' debacle of 2005 and France's longstanding discursive (if not 'official') opposition to Turkey's EU membership.

### *The Immigration Pact: Constituting European Values*

The 2008 French Presidency's European Pact on Immigration in many ways merely offered a consolidated statement of an array of proposals for the development of a common EU policy in the area of immigration and asylum, two areas which have been intrinsically linked with the EU's aim of establishing an 'Area of Freedom, Security and Justice' as enunciated in the Hague Programme covering the period 2004-2009.<sup>53</sup> Indeed, the Pact was intended as a political statement which would pave the way to a new replacement multi-annual programme in 2009. As such, the Pact makes familiar biopolitical statements on, *inter alia*: organising legal immigration in a manner that accounts for member state requirements; encouraging integration of immigrants; controlling 'irregular' or 'illegal' immigration by establishing a coherent and effective returns policy; establishing procedures for managing asylum claims; and establishing

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<sup>53</sup> European Council, "Presidency Conclusions," (Brussels: 4/5 November 2004). In fact the language on ending regularisation of immigrants was softened in the final draft of the Pact as a result of Spanish opposition.

further partnerships with countries of origin and transit. While the general goal of securing borders and, more generally, the presence of particular subjectivities within borders, can be regarded as consistent with a 'statist-legal' cosmopolitan rationality, many of the biopolitical ends are also compatible with market cosmopolitan rationalities. For example, much of the Pact emphasises the importance of making the EU an attractive place for 'highly skilled' third country nationals, via a proposed 'blue card' scheme. In other words EU policy is to offer porous borders to those who can contribute in terms of wealth generation and prosperity within its secured territory, while becoming ever stricter on those that do not fulfil this purpose. This tougher stance was reflected in aspects of the various drafts of the pact which, *inter alia*, proposed the ending of amnesties, suggested that member states should consider their 'capacity' to integrate family members of those already 'in-country' and emphasised the need to enforce expulsion and returns policies on 'illegals' or *sans papiers*.<sup>54</sup>

Here, for the reasons enunciated above, I want to focus on the French genesis of the Pact, many aspects of which, it ought to be noted, were not finally agreed by the member states, leading to substantial amendments. A central claim is that the French government's decision to focus on immigration policy was just as much a response to domestic concerns rooted in a Habermasian rationality, as it was an attempt to attract skilled migrants to France and Europe.<sup>55</sup> Of course, a concern with immigration and

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<sup>54</sup> In fact the language on ending regularisation of immigrants was softened in the final draft of the Pact as a result of Spanish opposition. See, Elizabeth Collett, "Policy Brief: The EU Immigration Pact – from Hague to Stockholm, Via Paris," *European Policy Centre (EPC)* (October 2008).

<sup>55</sup> The Front national also continues to occupy an important place in the French party-political landscape and mainstream parties are in no doubt of their political threat since the 2002 Presidential elections when Jean

asylum rooted in a sometimes confusing mix of market and 'statist-legal' rationalities also applies to other member states and to EU government in general, but it is notable that certain aspects of the pact clearly reflected French neo-republican priorities. As Carrera and Guild note, "[t]he strategy of the French Government has been to bring supranational legitimacy to some of its current priorities, visions and laws affecting human mobility and social inclusion and to transform them to some extent into European trends."<sup>56</sup>

Favell has highlighted the central features of these 'priorities, visions and laws' - this archetypically French governmentality - noting that universal constitutional principles are bounded in both cognitive and spatial terms, which, I would claim, are comparable with those described by Habermas. As he says, "[t]he debates in France [on immigration/immigrants] make the relation of principles to boundaries and membership clear..., unlike the rather vague, uncontextualised cosmopolitanism of much contemporary political philosophy."<sup>57</sup> And later, "France as a political entity is the

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Marie Le Pen made it to the second round of voting ahead of Lionel Jospin. As Favell notes (p.171) immigration is an issue where Le Pen's populism has clearly led to electoral success. His continued success, despite efforts to counter his political influence was, according to Favell's analysis of the 1990s, down to the fact that "it is difficult to tell apart any more, Le Penist philosophy, the new Gaullism of Chirac, and the neo-republican philosophy of the intellectual elite." Favell, *Philosophies of Integration : Immigration and the Idea of Citizenship in France and Britain*. p.172. We might well conclude that it remains difficult to discern clear differences between these philosophies. However, perhaps one key difference between the mainstream parties and Le Pen is the willingness of the former to sometimes implicitly support a market cosmopolitan logic and its irenic potential, as reflected in continued French support for EU(rope) and its far less chauvinistic and exclusionary rhetoric. Nevertheless, the proximity between these positions – and the possibility of sliding from one to the other - may be explicable in terms of the tensions identified in Habermas's legal cosmopolitan position, which, as noted, requires the drawing of borders.

56 Sergio Carrera and Elspeth Guild, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism Vs. Europeanisation? Security Vs. Rights?," in *CEPS Policy Brief*, ed. Centre for European Policy Studies (CEPS) (Brussels: CEPS, September 2008). p.5. See also, Collett, "Policy Brief: The EU Immigration Pact – from Hague to Stockholm, Via Paris."

57 Favell, *Philosophies of Integration : Immigration and the Idea of Citizenship in France and Britain*. p.80

constitutional paragon of a nation-state entirely conforming to the universal idealist model inscribed in international law".<sup>58</sup> As noted, aspects of French policy at the EU level have in recent years tried to promote Europe in the image of this paragon nation-state, just as Habermas has presented a similar neo-Republican image of the EU. To put it simply, the 'vague' cosmopolitanism of the sort alluded to by Favell aims at a *cosmopolitan Europe* – a pluralist Europe, respectful of difference associated with what I term a 'deliberative-legal' cosmopolitan government (see Part III) - whereas both Habermas and French policy arguably promote a bordered, distinctly *European* cosmopolitanism in an effort to rescue what they regard as the threatened image of the solidarist state.

Drawing on French government documents related to immigration/integration and the work of prominent French public philosophers who had a more or less direct hand in such documents, Favell describes the particular substantive subjectivities that are promoted in discourses and practices of integration within France. He notes that the, "liberty (of the individual) is in fact *conditional* on embracing the obligations and rights of the political sphere as their aim." More specifically, "it is this transformation of interests from self-interests to collective interests that enables the nation-state to *constitute itself* and be the democratic *Republique* of philosophical lore." At the same time, "the individual's identity as an individual is expressive of the political morality of the state, and *his or her individuality is indeed constituted by the adhesion to the collective.*"<sup>59</sup> As elucidated above, this

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<sup>58</sup> Ibid. p.83

<sup>59</sup> Ibid.81-3 emphasis added.

is a political morality which chimes with an image of state as interventionist welfare state - promoter of *social* security - and active citizens as the very authors of this state. It is an image which chimes with Habermas's co-originality thesis; in this case, as in Habermas's own writing on EU(rope), the *aporia* or *impasse* at the heart of the thesis is resolved in favour of defining in substantive (and therefore, potentially exclusionary) terms the subjectivity that is neo-republican citizen capable of constituting political unity by prioritising the political unity.

In accordance with such an approach, the early drafts of the proposed Immigration Pact sought to introduce the idea of an 'integration contract', which mirrored the French 'contrat d'accueil et d'intégration' (CAI) and is clearly rooted in a 'statist-legal' cosmopolitan rationality which draws on the imaginary of *social* contract. Geared towards the integration of the immigrant, in the French context the contract requires the obligatory attendance of a number of training sessions on fundamental French values – *inter alia*, equality of men and women and *laïcité* - and obligatory and free access to education in French institutions and French language. It is geared towards promoting for the immigrant "*son intégration républicaine dans la société française*" and "*une relation de confiance et d'obligation réciproque*" between the immigrant and state.<sup>60</sup> While the notion of an 'integration contract' was ultimately dropped from the European Immigration Pact,

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<sup>60</sup> My translation: It is geared towards promoting for the immigrant "his/her republican integration in French society" and a "reciprocal relationship of confidence and obligation". For details of the CAI, see the OFFI (Office Français de l'immigration et de l'intégration) website [http://www.ofii.fr/contrat\\_d\\_accueil\\_et\\_d\\_integration\\_47/en\\_savoir\\_plus\\_sur\\_le\\_cai\\_63.html](http://www.ofii.fr/contrat_d_accueil_et_d_integration_47/en_savoir_plus_sur_le_cai_63.html). Accessed August 2010.

under pressure from the Spanish government,<sup>61</sup> in its final version the pact still refers to measures to promote language learning and stresses the importance of "respect for the identities of the Member States and the European Union and for their fundamental values."<sup>62</sup>

As Carrera and Guild have noted, "one of the central innovative ingredients of the Pact is for a particular member state to successfully transplant... its own normative and political priorities to the EU level."<sup>63</sup> The acceptance of the Pact by other member states suggests that a 'statist-legal' cosmopolitan rationality that privileges a sovereign space and substantive identity and is ever more violent in its exclusion of certain identities is not the preserve of the French. Certainly the issue of terrorism (particularly so-called 'home-grown') has been significant in the discursive shift in member states, such as the UK, from a broadly multi-cultural approach towards policies rooted in a sovereign mode of government which resemble to far greater degree French integrationist strategies.<sup>64</sup> For France such a shift has presented an opportunity which may have seemed unlikely in the 1990s when, particularly in the light of wars in the former Yugoslavia, a multi-cultural, minority rights agenda was increasingly promoted by international organisations,

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61 Euractiv, "France Drops Controversial Immigrant Integration Plans," (2 July 2008), <http://www.euractiv.com/en/mobility/france-drops-controversial-immigrant-integration-plans/article-173839>. Accessed August 2010.

62 Presidency, "European Pact on Immigration and Asylum," (Brussels: Council of the European Union, September 2008).

63 Carrera and Guild, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism Vs. Europeanisation? Security Vs. Rights?."

64 Derek McGhee, *The End of Multiculturalism?: Terrorism, Integration and Human Rights* (Maidenhead: Open Univ. Press, 2008).



including the EU in the context of its enlargement policy.<sup>65</sup> Increasingly, however, it seems that the promotion of a set of strong communal subjectivities connected to nation-state among various categories of legal immigrants – and the concomitant exclusion of many ‘others’ – is an acceptable strategy at the European level. That said, it is important to highlight the inter-governmentalism which pervades the Pact; while common European values are invoked and governments are enjoined to share information, a substantive harmonisation is avoided. Indeed, it is evident that member states wish to remain the arbiter of which ‘third country nationals’ can enter and/or remain on their territories.<sup>66</sup> In this sense, it is important to note that the notion of Europe as nation-state is not fully embraced in French – or any member state – discourse.

It is notable that French EU policy determines that not *every-body* is to be afforded the possibility to respect the values that it emphasises. Such ambivalence is reflected in EU policy in general, which opens borders within the Schengen area and adopts an ostensibly open-ended enlargement policy rooted in constitutional principles, but simultaneously closes its external borders to many categories of people and to the members of certain states *en masse*. The question of which bodies should be permitted entrance and which excluded does, of course, present a conundrum for both liberal government and theory.<sup>67</sup> International obligations to refugees are reflected in the pact, which makes it clear that “the reinforcement of external border controls must not prove

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65 See, for example Will Kymlicka, *Multicultural Odysseys : Navigating the New International Politics of Diversity* (Oxford; New York: Oxford University Press, 2007). pp.51-3.

66 Collett, "Policy Brief: The EU Immigration Pact – from Hague to Stockholm, Via Paris."

67 Parker and Brassett, "Contingent Borders, Ambiguous Ethics: Migrants in (International) Political Theory."

an obstacle to the protection of refugees" (even as it, crucially, "gives no suggestion as to how to achieve this").<sup>68</sup> As for others wishing to become citizens, those "who will serve a country and its growth" are privileged.<sup>69</sup> However, a neo-liberal market rationality clearly privileges a different subjectivity from the active republican citizen and it is not clear that such a subjectivity – as discussed in Chapter 1, an entrepreneurial and competitive subject - is necessarily well equipped to meet the citizenship criteria laid out in any integration contract. Indeed, such a subject may be at odds with the explicitly solidarist aspects of the aforementioned criteria, as evidenced in such common concrete practices as tax avoidance. We see here, the tensions between a legal and market cosmopolitan rationality and the associated 'subjects of right' (citizens) and 'subjects of interest' (entrepreneurs) as they play out in practice (I return to consider this relationship in greater detail in Part III).

The key point for present purposes is that French – and by extension, their proposed *European* - immigration policy will necessarily not permit many (indeed most) categories of immigrants to even attempt to meet the specified criteria. Assimilation is the possibility afforded to a select few and the rest are simply excluded. The shift from a discourse of assimilation (in relation to 'legal' immigrants) to a discourse of exclusion (in the case of 'illegal' immigrants) has also been evident in relation to French discourses on enlargement.

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68 Carrera and Guild, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism Vs. Europeanisation? Security Vs. Rights?" p.3.

69 Sarkozy aide, Dominique Paillé, cit. Jason Burke, "'Blue Card' Plan for EU Migrants," *The Guardian* (29 June 2008), <http://www.guardian.co.uk/world/2008/jun/29/eu.france>. Accessed August 2010.

French reactions to the European Commission's 2004 proposals for a Services Directive – also known as the 'Bolkenstein directive' after Internal Market Commissioner of the time – also offers illustration of the limits of a Habermasian moral geography. The controversial 'country of origin' rule contained in this proposal had it that service providers moving on a temporary basis would be able to operate under the regulation of their home country. This principle in particular generated much political opposition from a number of member states and a number of non-governmental organisations campaigning for a social Europe. The major concern was that this principle would place downward pressure on social standards within those member states with substantive safeguards and/or lead to job losses for the domestic workforce operating under more stringent regulatory standards. In the light of the upcoming referendum in France on the constitutional treaty, the services directive became an issue of concern in French public and political discourse towards the end of 2004. Sensing the popular mood, President Chirac publically opposed the directive in February 2005 and French protestors were increasingly active in Brussels during the same period. Certainly the debate surrounding this directive was a major contributing factor in the rejection of the constitutional treaty (see Chapter 3) later that year.

What is particularly interesting for current purposes is the manner in which opposition to the directive was tied to opposition to EU enlargement policy and, in particular, the

member states that had joined the union in 2004.<sup>70</sup> In March 2005 Philippe de Villiers, the head of the right-wing Movement for France party, invoked the spectre of workers from many of these new member states – most famously ‘the Polish plumber’ – coming to France, working on the basis of country of origin pay and social security regulations and thereby securing jobs ahead of better paid and protected French workers.<sup>71</sup> Shortly afterwards, and somewhat provocatively, the man responsible for the directive, internal market commissioner Frits Bolkenstein, said that he was looking forward to the arrival of the Polish plumber, “because it is difficult to find an electrician or a plumber where I live [apparently his second home] in the north of France.”<sup>72</sup>

In this case the implication seemed to be that a neo-liberal market rationality, epitomised in the directive, needed to be reined in, but that the Polish plumber would be welcome in France on French terms. In other words, an assimilatory agenda similar to the governmentality of an integration contract seemed, for the most part, to be at play. However, turning to another case – French opposition to Turkey – it can be illustrated that, as noted above, an assimilatory agenda can easily slide into a politics of exclusion. In line with Habermas’s notion that Europe must *distinguish between members and non-members*, French President Sarkozy has stated even more definitively that, “we have to

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70 Of course, restrictions were initially placed on the movement of workers from certain of these countries by most ‘old’ member states, including France, but these were always to be ‘transitional’ (in fact France finally fully opened to the 2004 accession countries in 2008, when it assumed the rotating Presidency).

71 It is interesting to note attempts by the Polish tourist industry to play on this term, as in an advertising campaign depicting a Polish plumber telling a French audience that ‘je reste en Pologne – venez nombreux’ (‘I’m staying in Poland, do come’). See, for example, “‘Polish Plumber’ Beckons French,” *BBC News Online* (21 June 2005), <http://news.bbc.co.uk/1/hi/world/europe/4115164.stm>. Accessed August 2010.

72 Elaine Sciolino, “Unlikely Hero in Europe’s Spat: The ‘Polish Plumber’ ” *The New York Times* (26 June 2005), [http://www.nytimes.com/2005/06/26/international/europe/26poland.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2005/06/26/international/europe/26poland.html?_r=1&pagewanted=print). Accessed August 2010.

say who is European and who isn't. It's no longer possible to leave this question open".<sup>73</sup> And he has answered his own question unequivocally in relation to Turkey, which, he has claimed, "has no place inside the EU".<sup>74</sup> Former French President Giscard d'Estaing, and president of the Convention on the Future of Europe, has similarly declared that, "Turkey is not a European country," but part of "another culture".<sup>75</sup> Europe is thereby constituted in relation to a Turkish other, which – in these rhetorical statements, if not in practice – is excluded as irrevocable other. Turkey is not part of the European physical or moral geography as far as these French leaders are concerned and this is reflected in widespread public opposition, which became apparent in the context of the rejection of the constitutional treaty in 2005.<sup>76</sup> France is certainly not alone in its opposition to Turkey. German Chancellor Angela Merkel, along with Sarkozy, has in the past expressed her preference for a so-called 'privileged partnership' between the EU and Turkey, Austria has expressed strong reservations and there is widespread opposition within the EU populace to Turkey's potential membership.<sup>77</sup>

Just as in its immigration policy proposals, it is clear that in French political discourse related to enlargement, not *every-body* can be afforded the opportunity to become European citizen. In the case of the Polish plumber the concern is that mobile workers

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73 Cited in Katrin Bennhold, "Sarkozy's Question: Who Is European?," *International Herald Tribune* (8 September 2006), <http://www.iht.com/articles/2006/09/08/news/sarko.php>. Accessed August 2010.

74 Barcin Yinanc, "Sarkozy's Obsession Perplexes Turks," *Turkish Daily News* (17 December 2007), <http://www.turkishdailynews.com.tr/article.php?enewsid=91568>. Accessed August 2008.

75 Elaine Sciolino, "Ex-French President Snubs Turks on Union Bid," *The New York Times* November 9 2002.

76 French opposition to Turkish membership was 70% in 2005. See, Anthony Browne, "Most Want Turkey to Stay out of the EU, Poll Shows," *The Times* (19 July 2005), <http://www.timesonline.co.uk/tol/news/world/europe/article545446.ece>. Accessed August 2010.

77 Zeynep Gogus, "Winning Back Confidence in EU-Turkey Relations," *EurActiv Turkey* (17 October 2007), <http://www.euractiv.com/en/enlargement/winning-back-confidence-eu-turkey-relations/article-167630>. Accessed August 2010.

will threaten the character of France as host society unless regulated on French terms; in this instance the spectre of a neo-liberal Europe threatens the 'universal' neo-republican – or, paradoxically, *European* - values that France embodies. In the case of Turkey the exclusion appears to be more definitive; it is a matter of irrevocable cultural difference, which no legal provision or legal alignment can alter. This is, of course, in contrast to a theoretical Republican universalism: "[t]raditionally, the French concept of a 'universalistic principle' affirms the unity of mankind even as it acknowledges differences. It posits that all men have the same intellectual and moral capacity and potentiality, even if we can observe differences in their realization."<sup>78</sup> It is also in contrast to (and, arguably, a direct reneging on) the official EU policy which assesses potential candidates on the basis of their ability to meet certain conditions and assumes that candidates are capable of meeting such conditions: specifically, their capacity to demonstrate "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union."<sup>79</sup> While, unlike certain French discourses, the EU has extended this possibility to Turkey, it is important to note that it has not itself been willing to designate every applicant for membership a 'candidate' as reflected in its exclusion of Morocco, which was denied on rather spurious geographical grounds.<sup>80</sup>

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78 E. L. Lefebvre, "Republicanism and Universalism: Factors of Inclusion or Exclusion in the French Concept of Citizenship," *Citizenship Studies* 7 (2003). p.23.

79 Excerpt from European Council, "Copenhagen Presidency Conclusions," (1993). These conditions are known as the 'Copenhagen criteria'.

80 It is notable that Turkey has not entirely avoided such cartographic exclusion: The apparently innocuous process of redesigning the one-Euro and ten-cent coins in 2007 exposed the differences between the European commission and certain council perspectives on Turkey's European vocation. These coins include on them a map of Europe, inclusive of the landmass encompassing all EU member states, which required alteration

An exclusionary politics in Europe, it should be emphasised again, is not then the preserve of the French Republic. It is certainly not inevitable that French policy will deny Turks the opportunity to prove their 'European' credentials or that Europe will afford them that opportunity. Indeed, the decision to give Turkey candidate status was agreed unanimously, including by the previous French President, Chirac.<sup>81</sup> However, it can be asserted that France might be more prone to both assimilatory and exclusionary policies on the basis of cultural identity precisely because it seeks to safeguard a *substantive* neo-republican model (in France and for Europe) of the sort discussed above.<sup>82</sup> Exclusion of identity, if not particular subjects, is part and parcel of the resolution of the abovementioned Habermasian *aporia* in favour of the substantive constitution and arguably to the detriment of a democratic pluralism.

That said, it is perhaps ironic that France has tended to adopt this exclusionary stance towards Turkey given that the latter has been inspired to a large extent by French

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following the 2004 enlargement. The Financial Times reported the matter as follows: "The European Commission proposed a map of Europe as far east as the Caspian Sea, including the whole of Turkey. But a private meeting of national governments grouped in the European Council indulged in some colonial-style redrawing. EU member Cyprus was squeezed into the revised design by shunting it hundreds of kilometers west of its true location below Turkey to lie next to Crete.... 'The council has deliberately and secretly wiped Turkey from the new face of the euro,' said Marco Cappato and Marco Pannella, Italian Liberal MEPs, in a statement. They are angry that the design shows 'dictatorships, such as Belarus', but not 'a democratic country like Turkey with whom accession talks are ongoing'." Andrew Bounds, "EU States Wipe Turkey Off Euro Coin Map," *Financial Times*, 25 September 2007.

81 However, at the same time Chirac pledged that the French people that a referendum on Turkish membership would be held once Turkey had met the abovementioned criteria, leaving the prospect of a single member state deciding Turkey's fate. That said, in 2008 the French Senate voted to drop this pledge from the constitution. Euractiv, "France Scraps Referendum on Turkey's EU Bid," (25 June 2008), <http://www.euractiv.com/en/enlargement/france-scraps-referendum-turkey-eu-bid/article-173616>. Accessed August 2010.

82 This is contrast, for example, with the UK, which has been and still is a keen champion of Turkey's membership and also tends to see (and champion) the EU as a market cosmopolitan construction.

republican ideals and – perhaps as a direct consequence - confronts many of the same issues that animate contemporary French politics. Turkey also refuses to afford meaningful recognition to significant internal minorities, most famously, its Kurdish population in the south-east. Although the Turkish population is overwhelmingly Muslim, secularism (*laiklik* from the French, *laïcité*) is a central feature of Kemalism and the Turkish Republic's constitution and the desire to control religious expression – above all, Islam - in the public sphere is a preoccupation in both republics.<sup>83</sup> Indeed, as Gökariksel and Mitchell note, “early French conceptions and implementations of *laïcité* and republicanism greatly influenced intellectuals and politicians of the late Ottoman Empire and remain key principles for the Republic of Turkey.” And, just as in France, “Turkish secularists see veiling, and particularly its new urban style, as a threat to the republic, its ideal citizen and the modern way of life.”<sup>84</sup> Indeed, it is notable that both France and Turkey have this substantive vision of ‘ideal citizen’ which, if anything, is far more reified within the apparatus of the Turkish Republic, where the fear of internal and external threats is reflected in certain securitising tendencies.<sup>85</sup> Moreover, in discussions with the European Commission on questions of minority rights and freedom of religion,

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83 Both countries have faced cases in the ECtHRs in relation to the headscarf and both have had the right to outlaw the headscarf in particular public institutions upheld. It could certainly be argued that the existence of the French policy has meant that Turkish claimants have had far less chance of winning their cases against the Turkish state even though the ban applies for more widely in the Turkish context. See, for instance: Jonathan Sugden, “A Certain Lack of Empathy,” (Human Rights Watch, 2004).

84 Banu Gokarisel and Katharyne Mitchell, “Veiling, Secularism, and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France,” *Global Networks* 5, no. 2 (2005). Owen Parker, “‘Cosmopolitan Europe’ and the EU-Turkey Question: The Politics of a ‘Common Destiny’,” *Journal of European Public Policy* 16, no. 7 (2009).

85 Such tendencies have, of course, been apparent in well-documented human rights abuses. Although in recent years such abuses are, according to the European Commission diminishing, there have, inter alia, been a number of recent cases where freedom of expression or association has been repressed with reference to a conception of ‘Turkishness’ or the unity and indivisibility of the Turkish nation.



the Turkish authorities have often invoked French policy in order to defend their own position.<sup>86</sup>

There are of course important differences in both contexts, particularly the fact that in Turkey the state has more direct involvement in funding religion and controlling the religious message, particularly in mainstream Sunni Islam.<sup>87</sup> Nevertheless, given the similarities, it seems peculiar that France is so fundamentally opposed to Turkey's EU bid, emphasising its irrevocable Islamic identity in a manner that seems to contradict its very own notion of a religion-transcending universalism. As Zurcher has asked in relation to Turkey's relations with Europe and the rest of the world more generally, "...is it not true that the West, with its so-called crucial legacy of 'the separation of powers', is really the party failing to separate politics from religion?"<sup>88</sup> It might be thought that France would be ready to assimilate a Turkey which has aggressively – if, frequently, *illiberally* and violently – pursued its own assimilation into the West and Europe and, more specifically, modelled itself closely on the French Republican ideal. But identity politics or the particular is, in fact, never far away from a cosmopolitan universalism and when assimilation is adjudged to have failed or simply considered to be impossible – perhaps in the case of Turkey-EU(rope), somewhat unfairly – assimilation necessarily become an exclusion. Indeed, as noted, assimilation is always-already an exclusion of

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86 Parker, "'Cosmopolitan Europe' and the EU-Turkey Question: The Politics of a 'Common Destiny'."

87 Gokarisel and Mitchell, "Veiling, Secularism, and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France." pp.151-2.

88 Eric-Jan Zurcher and Heleen van der Linden, "Searching for the Fault Line: A Survey of the Role of Turkish Islam in the Accession of Turkey to the European Union in the Light of the 'Clash of Civilisations,'" in *The European Union, Turkey and Islam*, ed. W Asbeek Brusse and I.J Schoonenboom (Amsterdam University Press 2004)., p. 151

identity, if not of its subjects or possessors who are sometimes permitted to change, offered conditionality. The Turkey-EU(rope) case is perhaps illustrative of the fundamental tension in a Habermasian constitutional patriotism, a French neo-republicanism or, more generally, a 'statist-legal' cosmopolitan rationality of government. The move to exclude seems explicable then in the same way that Habermas's advocacy of a core Europe can be reconciled with his cosmopolitanism; in other words, in terms of a resolution of the *aporia* in his co-originality thesis in favour of the constitution of a clearly delimited *demos*. Ultimately, an oxymoronic and delimited *European* cosmopolitanism.

### **Limits and Possibilities of a 'Statist-Legal' Cosmopolitan Government**

Habermas positively asserts a European constitution in the face of a neo-liberal economic constitution and highlights its immanence in an extant constitutional patriotism in European member states. However, as becomes apparent in the attempt to generalise or up-scale these constitutional principles to the European level – and the associated *aporia* in Habermas's co-originality thesis - the legal constitutive act also *requires* the drawing of boundaries or a 'territorialization' and the associated identification of various 'others' to a 'political unity'. Foucault's analysis in his lecture series "Society Must be Defended" (2003) alerts us to the fact that even *within* the context of member-states, any supposed 'patriotism' towards constitutional principles was not arrived at pacifically and, indeed, even contemporaneously a sense of patriotism may not be shared by all those subject to the law. From such perspectives, the internal or 'normal' constitutional politics of the

liberal state begins to appear less distinct from 'the exceptional' politics-at-the-limit justified by a discourse of securitisation than is frequently portrayed in both realist and liberal accounts of International Relations. Indeed, the very notion of a 'normal' (liberal) politics is something of a misnomer if we take seriously Foucault's conception of power as acting within/ throughout all social relations. The implication in Foucault's famous reversal of Clausewitz's dictum – or, more accurately, his exploration of *historical discourses rooted in* the assertion that *politics is the continuation of war by other means*<sup>89</sup> – is that strategies and practices of security can be regarded as omnipresent in social relations.

It is such historical discourses of struggle – a counterpoint to a philisophico-juridical discourse born in Roman law - that, according to Foucault, Hobbes sought to repress. Indeed, Hobbes "wards off" such a discourse "by making all wars and conquests depend upon a contract, and thus by rescuing the theory of the State. And that is why the philosophy of right subsequently rewarded Hobbes with the senatorial title of 'the father of political philosophy'".<sup>90</sup> In Foucault's analysis, Hobbes's war of all against all is not actually a war at all:

Although it seems to be proclaiming that war is everywhere from start to finish, Hobbes's discourse is in fact saying quite the opposite. It is saying, war or no war, defeat or no defeat, Conquest or covenant, it all comes down to the same thing: "It's what you wanted, it is you, the subjects, who constituted the sovereignty that represents you."<sup>91</sup>

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89 Foucault, *"Society Must Be Defended" Lectures at the Collège De France, 1975-76*. p.15.

90 Ibid. p.99.

91 Ibid. p.98.

According to Foucault the ostensible contractual consent for Leviathan's rule is actually rooted in an ontology of survival. This is enough, for Hobbes, to lend this rule legitimacy even as the line between consent and conquest becomes blurred and the latter threatens to efface any pretensions to self-determination. In a comparable, if more *cosmopolitan*, philosophico-juridical vein, Habermas seeks to render the law as the outcome of a consensus which is borne out of a linguistic ontology – his discourse ethic and theory of co-originality. His discursive adversary may, similarly, be those who pursue an oppositional discourse – what Foucault characterises as a 'historico-political' discourse - which does not recognise the exceptional as such, but considers the normal, the law, as a front to an ongoing race or class war. This understanding of law may indeed be central to the constitution of such groups.<sup>92</sup> Indeed, such groups may, to steal from Foucault's terminology, consider themselves in the image of *barbarians* in the sense that they are not seeking to join a civilisation, but to oppose it "setting it ablaze and destroying it".<sup>93</sup> With reference to the race struggle as it has played out for black African Americans, Reid identifies the bind that this presents to such groups, for whom it may sometimes appear as a choice between war and submission.<sup>94</sup>

It is such identities that a Habermasian form of argumentation seeks to reconcile with the virtuousness of law; in his reckoning those that reject the law as repressive are no longer barbarians, but the famous *savages* of the social contract and constitution; they are, potentially, constitutive of civilisation rather than civilisation's permanent enemy. He

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92 Neal, "Goodbye War on Terror? Foucault and Butler on Discourses of Law, War and Exceptionalism."

93 Foucault, "*Society Must Be Defended*" *Lectures at the Collège De France, 1975-76*. p.195.

94 Reid, "Life Struggles: War, Discipline and Biopolitics in the Thought of Michel Foucault."

attempts, then, to demonstrate that it is not a choice between oppression and war, highlighting that they too can play a role in the rational constitution of law and ensure that it offers a space for self-determination. These savages – and, we are, of course, according to this discourse all savages at the outset – are capable of unity, of collectively expunging from the European social body tensions arising from racial and class based rivalries and constituting the irenic nation-state. His strong belief in the juridical-philosophical form, in Kant and enlightenment, is perhaps because it is considered that it is discourses of race, class and permanent war as inevitable drivers of history, which have legitimated a practical politics of will to power.<sup>95</sup> This is a will to power that, for Habermas, would seem to be associated with both a contemporary nationalism and a neo-liberalism, both of which constitute a competition that is not conducive to peace. In ethno-nationalist form, this is a politics that can, of course, be conceived as having had such devastating consequence in the modern history of his own country, Germany. And in contemporary times, a neo-liberal rationality of competitiveness similarly undermines the potential for democratic self-rule, as discussed in Chapter 3. He would seem to concur with Kant (see Chapter 1) that a cosmopolitan law is that which will underpin a genuine freedom in the sense of communicative self-determination. From this perspective, Habermas's defence of legal constitutionalism and a post-ethnic patriotism can be seen as an ethically important intervention in/for Europe. The law, and a communicative rationality underpinning it, is that which must civilise and pacify a war of race/class and in that sense, the assertion of a sovereign law – albeit as cosmopolitan right – is an important one.

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<sup>95</sup> Habermas, *The Philosophical Discourse of Modernity*

However, this depends on an interpretation of modern totalitarianism and the violence it inflicted as being a direct consequence of a historico-political discourse of struggle. In Foucault's interpretation, the extremes of twentieth century war and totalitarianism are a consequence not only of the coalescence in the nation-state of a discourse of race war propagated by historico-political discourses, but, more importantly, its *distortion*.<sup>96</sup> As Foucault says, "we see the emergence of the idea of an internal war that defends society against threats born of and in its own body."<sup>97</sup> Whereas the historico-political discourse regarded race war as an ongoing interminable struggle between distinct poles or groups, in its appropriation by the state as *nation*-state it is re-worked in accordance with a social-Darwinian logic such that it redirects the sovereign right to take life towards the biopolitical *universalisation* of a single race, justifying a war to end all wars. A biopolitics concerned above all with preserving and nurturing the population becomes compatible, then, with a biopolitical race war inflicted on the 'inferior' or 'uncivilised'. In other words a biopolitics of racial purity (drawing on a mix of biological science and tradition) combines with a sovereign right to kill in a manner which justifies slaughter on an unprecedented scale.<sup>98</sup> This is a racialised 'end of history' rather than the market cosmopolitan end of history associated with Fukuyama and mentioned earlier in the thesis. It is interesting to note that liberalism can tend to both of these cosmopolitan dreams via a will to knowledge that is a desire for both cognitive and temporal closure (see Conclusion for more on this).

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96 Reid, "Life Struggles: War, Discipline and Biopolitics in the Thought of Michel Foucault."

97 Foucault, "*Society Must Be Defended*" *Lectures at the Collège De France, 1975-76*. p.216.

98 Ibid. pp.239-264.

For now it is important to recognise that Habermas's targeting of the race/ class war associated with a historico-political discourse perhaps understates the importance of its fusion with a *universalising* discourse in the context of the twentieth century horrors that, in large part, his assertion of a *universal* constitutional patriotism in/for Europe seeks to confront. The effacement, *à la* Hobbes, of *all* identities of rebellion and opposition with a logic of consensus can paradoxically tend to the very totalisation that the deployment of a Kantian legal cosmopolitan rationality intends to target. Indeed, a Habermasian 'statist-legal' governmentality may seek to limit the possibility of a civil war, *produce* solidarism, an ethic of care and a sense of *social* security for an 'us', but it must simultaneously secure this 'us' from a host of 'others' conceived as threat to the social *body* and the two moves may be mutually dependent.

The constitution of a solidarist citizenry in a delimited Europe can only secure itself with some, at least implicit, reference to an outside, a constitutive non-citizen. As we have noted with reference to the *aporia* in Habermas's co-originality thesis, some vestige of community formation/ definition is necessary if a 'constitutional moment' is to be democratically legitimate. While he claims that such a community is not grounded in racial, cultural or ethnic categories, it is, nevertheless, underpinned by some *conditional* or *particular*, as evidenced in the discussion of French discourses on EU(rope) which promote the image of ideal republican citizen. Any decision commensurate with such conditionality inevitably raises the spectre of sovereignty and, as Valverde notes, "in so

far as sovereignty cannot be dispensed with, even in social democratic and/or republican regimes, racism continues to be not only possible but even necessary."<sup>99</sup> Indeed, as we have stated, in targeting a prevalent neo-liberalism Habermas essentially reproduces the *universal* nation-state at European level; a sovereign nation-state that, in its appropriation of a historico-political discourse, claims to cast war to its margins.

Of course, following Kant, in Habermas's politics and theory, there lies the implicit promise of *inclusion, hospitality or amity* on the *condition* that 'other' respect the *particular* constitutional values he prescribes for Europe which, ideally, are synonymous with the capacity for reasoned communication. The promise of assimilation or integration – of subjects as nation-states or as individuals – is, of course, that which renders a 'statist-legal' rationality *cosmopolitan* in the Kantian tradition of hospitality and distinguishes it from racial, ethnic or cultural accounts and visions of Europe, including those rooted in a biological scientism (famously opposed by Habermas) that have wrought such extreme violence on the continent. In the French case, the individual is cajoled or manipulated into thinking in terms of the *French* or *European* collective as a condition for citizenship within those collectives. Such a cosmopolitan condition, while it may constrain subjects, is clearly far removed from a totalitarian extermination.

However, as the French case also demonstrates, in contemporary European politics there is a proximity between such a conditionality and a politics of exclusion. In the context of a biopolitics concerned with governing population or social *body* in terms of various

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99 Valverde, "Law Versus History: Foucault's Genealogy of Modern Sovereignty." p.141.



equilibria associated *inter alia* with demography, it is only a very short step from an assimilatory governmentality of disciplines focused on inclusion to an agenda that excludes some *temporarily* and only another very short step to a policy that regards particular bodies or groups of bodies as *primordially* 'other' – irrevocably hostile to the polity, the way of life, values or, going further, *the very integrity of life itself* - and justifies expulsion. In the implementation of a 'statist-legal' rationality, the cosmopolitan promise of assimilation can easily slide into the violent politics of exclusion, even as the rhetoric of *universal* right professes to guard against such tendencies. And this is because, 'society must be defended' is the *sine qua non* of a 'statist-legal' cosmopolitan government.

## Conclusion

This part of the thesis has reflected upon the possibilities and limits of a 'statist-legal' cosmopolitan government as it is manifest in a distinctly *European* cosmopolitan government. On the one hand, I have argued that in its assertion of the solidaristic aspects of the nation-state's political constitution at European level, a 'statist-legal' rationality can be regarded as palliative to the depoliticising impact of a neo-liberal economic constitution. On the other hand, I have sought to problematise Habermas's form of critique "practiced in the pursuit of formal structures with universal value."<sup>100</sup> In particular, I have drawn attention to the particular "subjects of right" – specifically, the (neo)-republican citizens – that such a 'statist-legal' rationality promotes and highlighted

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100 Foucault, "What Is Enlightenment?." pp.45-46.

the necessarily exclusionary and potentially violent conditions of possibility of such a subject. Embedding the critique in French discourses on EU(rope), this part of the thesis has demonstrated that such a governmentality does not transcend the necessity of a sovereign decision; a cognitive and spatial closure.

While the assertion of 'statist-legal' cosmopolitan rationality in/for Europe certainly casts light on the dangers of a market cosmopolitan rationality taken to its extreme and effectively reclaims the law from the market, such interventions are not, I have sought to show in this chapter, to be treated as an ethical panacea. Indeed, I have tried to demonstrate that governmental rationalities rooted in the idea of a self-determining European *demos* create just as many ethical questions as they answer. In generalising the European welfare-state, a European social contract, or European constitution, Europe's plural realities are potentially undermined in favour of a constitutional uniformity and this European identity is constituted at the expense of a range of 'others' – the 'Polish plumber', 'Turkish culture' or a host of 'immigrant' identities - both internal and external to the political unit. Habermas asserts a constitution as that which will make possible a self-determining autonomous citizenry, but his very assertion fails to reflect on the conditions of possibility of that very assertion – his own universalising sovereign impulse - which potentially undermines the autonomy of those that do not identify with EU(rope), in whatever form. It is as if a belief in the possibility of autonomously arrived at consensus - the ontological underpinning of his discourse ethic - permits the assertion of consensus, which, of course, threatens the very autonomy on which it is based. More generally, the law, even when rendered cosmopolitan or European, is never entirely divorced from the image of a sovereign identity which must constantly secure its

existence. As Foucault has said, “right, peace and law were born in the blood and mud of battles” and, it might be said, in the context of contemporary European government are continuously reborn at the expense of a host of defeated ‘others’.

Even as it prevails and erodes a solidarist ethic, a market cosmopolitan governmentality – which, as argued in Chapter 2, has been significant in the constitution of an ostensible order among nations and of European *Union* itself – might therefore offer something of ethical importance in the confrontation with a *European* cosmopolitanism-cum-nationalism. As noted in Part I, this was certainly the belief and goal of Monnet and thereafter the post-war German ordo-liberals and it is such a belief which underpins the concerns of some current European leaders as the spectre of both economic protectionism and extreme right activism looms in Europe. As briefly noted in Chapter 3, Habermas’s privileging of Europe – rather than nation-states - and his tacit support for certain of the social consequences of globalisation in terms of a shrinking of political and cultural space and a broadening of public sphere (itself a product of bourgeois society in his analysis), demonstrates that he recognises this potential role of the market (I turn to this in greater detail in Chapter 6). It is not, for Habermas, then, a matter of replacing the ‘subject of interest’ with the ‘subject of right’. He wants to reassert the latter in the face of the prevalent former; constitute a citizen with communicative rationality in the face of an all pervasive instrumental rationality promoted by a neo-liberal agenda, without ever entirely undermining the constitutive effect of the market on the cherished (and

increasingly post-national) public sphere.<sup>101</sup> A similar approach has characterised French discourses towards/ in Europe. While playing a central role in the integration of a market cosmopolitan Europe (as discussed in Chapter 3), French discourses have actively resisted its excesses through the assertion of a sovereign legal cosmopolitan rationality, sometimes nationally and sometimes at European level.

There may be very good contingent ethico-political reasons for the move towards a 'statist-legal' cosmopolitan government, but for many who support Habermas *qua* cosmopolitan theorist, such a move surrenders far too much of the respect for autonomy and difference inherent in his own discourse ethic and cosmopolitan theory. Consequently such scholars and practitioners have a vision of post-national government which seeks to maintain, promote and celebrate a plural reality to a much greater degree than Habermas who, in adjudicating on the unacknowledged impasse in his co-originality thesis, privileges the law or the constitution above a plural deliberative democracy. A constitution involves an unavoidable act of assimilation or exclusion, which frees a political unity from threat. When such a constitution is based on a 'statist-legal' cosmopolitan rationality rooted in a Westphalian geopolitical imaginary or methodological nationalism, both its assimilatory and exclusive potentials are clearly visible in terms of spatial cartographies. When such a legal cosmopolitan rationality of government places the accent on deliberation – when it is a 'deliberative-legal' rationality

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101 Habermas, *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society*. Habermas notes here that the public sphere emerged in bourgeois society. In this sense, we can say that he detects a complementarity as well as tension between the 'subject of right' and 'subject of interest'. As does Foucault who notes of the market that, "while it brings individuals together through the spontaneous convergence of interests, it is also a principle of dissociation" (see Chapter 1).

– I will argue that it also requires securitising in terms of a particular ontology, even as its effects are less easily visualised in spatial terms. It is to this alternative ‘deliberative-legal’ cosmopolitan rationality that I turn in Part III.

**PART III:**

**LEGAL COSMOPOLITAN GOVERNMENT II:**

**THE ETHICS OF A *COSMOPOLITAN* EUROPE**

World is crazier and more of it than we think,  
Incorrigibly plural.

*Louis MacNeice*<sup>1</sup>

In an age of globalization and significant authority delegated beyond the nation-state, I contend that democracy needs to be re-thought in the plural, as the rule of *demoi*. This small change of one letter has enormous normative, political and institutional significance and permits us to better understand how it is that citizenship and membership need to be transformed. Much as a cubist painting alters the given world of objects through the use of multiple perspectives, transnational democracy challenges single perspective politics and fixed jurisdictions.

*James Bohman*<sup>2</sup>

Perhaps also part of what dialogic understanding entails is the *acceptance of divergence, breakage, splinter, and fragmentation as part of the often tortuous process of democratization*. The very notion of "dialogue" is culturally specific and historically bound, and while one speaker may feel secure that a conversation is happening, another may be sure it is not. The power relations that condition and limit dialogic possibilities need first to be interrogated. Otherwise, *the model of dialogue risks relapsing into a liberal model that assumes that speaking agents occupy equal positions of power and speak with the same presuppositions about what constitutes "agreement" and "unity" and, indeed, that those are the goals to be sought*.

*Judith Butler*<sup>3</sup>

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1 Louis MacNeice From the poem, *Snow*. <http://www.artofeurope.com/macneice/mac5.htm>. Accessed August 2010.

2 Bohman, *Democracy across Borders : From Demos to Demoi*. p. vii

3 Judith Butler, *Gender Trouble : Feminism and the Subversion of Identity*, Thinking Gender (New York: Routledge, 1990).p.19 emphasis added.

One scholarly and institutional response to the pathologies associated with a market and legal cosmopolitan government discussed in the preceding parts of this thesis has been the invocation of 'governance'. Governance – specifically an open-ended, pluralist and inclusive mode of decision making – is said to offer an alternative or way beyond the expert rationalities associated with the market and the law enunciated in the preceding sections. Governance, from this perspective, is respectful of difference and change and to the extent that it has a vision of/for EU(rope), it is - in contrast to Habermas's oxymoronic European cosmopolitanism - a *cosmopolitan* Europe. This is a vision of governance and of EU(rope) that has been promoted in a range of recent scholarly literatures and in institutional reflections, particularly emanating from the European Commission. Chapter 5 traces this discourse on deliberative governance, noting that it shares an ontological basis in a Habermasian 'discourse ethic' discussed in Part II. While Habermas seeks to ground his 'discourse ethic' or communicative rationality in a constitutional legal order, from a deliberative perspective, a communicative rationality is not to be institutionalised once and for all. Rather, policies and decisions are to be made on the basis of an open-ended process of deliberation that is to include all affected parties or stakeholders. This is in contrast to an *a priori* privileging of the expert knowledges associated with market or law.

Chapter 6 turns to consider the possibilities and limits of this governance turn in theory and in practice. It does this through a consideration of the EU's 'open method of co-ordination' (OMC), which has been vaunted by certain scholars as an immanent example of a 'soft' or deliberative governance mode in post-national politics. It is argued that in practice, the ostensibly open method is delimited by the market cosmopolitan rationality

associated in particular with the Lisbon competitiveness agenda of 2000 and, more generally, with the economic constitution of the European level of government itself. Thus, a turn to 'social' policy associated with the OMC involves a reconception of social security. Collective security is individualised or risk is devolved downwards and individuals are enjoined to become entrepreneurs of themselves. It is argued that the move to a 'deliberative-legal' rationality of cosmopolitan government understates the extent to which a dominant discourse – in this case a market cosmopolitan rationality in general and the economic constitution (Chapter 2) in particular – constrains both the seeable and the sayable and delimits the possibility of resistance by its central agent, civil society. Indeed, contrary to certain deliberative perspectives, civil society is not a space 'outside of power'. The ambiguous relationship between 'subject of right' (citizen) and 'subject of interest' (entrepreneur) (see Chapter 1) is thus not overcome in the championing of this deliberative 'third-way'.



## Chapter 5: Conceiving Legal Cosmopolitan Government II: Plural Europe and Deliberative Governance

### Introduction

Notwithstanding the claims of market cosmopolitan advocates (Part I), there are well-known and significant question marks relating to the EU's legitimacy, which have been a feature of European institutions ever since the ECSC. Concerns have been raised about the substantive *outputs* associated with prevailing market rationalities; the ways in which solidaristic conceptions of the social have been undermined, as examined in Part II.<sup>1</sup> As highlighted with reference to Habermas, related to this concern with *outputs*, is a concern with the *inputs* or practices which have led to the *status quo* of cosmopolitan government in Europe. The claim is made that they are and, to some extent, have always been, inherently undemocratic.<sup>2</sup> Hence, just as Monnet was accused of pursuing undemocratic means, so today the accusation of democratic deficit is frequently levelled at the contemporary EU. Indeed, given the contemporary importance of democracy as legitimising principle, the deficit is perhaps perceived as greater than ever. That said, if the definition of democracy is contested within nation-states, it is *highly* contested in the

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1 Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford Univ. Press, 1999).

2 There is an extensive literature on this subject. See, for example, Svein S. Andersen, *The European Union: How Democratic Is It?* (London: Sage, 1996), Andreas Follesdal and Simon Hix, "Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik," *Journal of Common Market Studies* 44 (2006), Kevin Featherstone, "Jean Monnet and the 'Democratic Deficit' in the European Union," *Journal of Common Market Studies* 32, no. 2 (1994), Beate Kohler-Koch and Berthold Rittberger, *Debating the Democratic Legitimacy of the European Union*, Governance in Europe (Lanham, Md.: Rowman & Littlefield, 2007).

context of European (or, indeed, global) government. The weaknesses of parliamentary democracy in Europe; the elitist nature of the European bureaucracy; the lack of broad-range civil society inclusion in decision-making; and the sovereignty of European law over national law, represent just some of the issues which are highlighted with reference to the notion of democratic deficit. Indeed, the European project itself is regarded by some as inherently anti-democratic. As noted in Part II, Habermas seeks to resolve this situation through the assertion of a demos and a constitutional settlement which might underpin a 'social' Europe, but such a move is itself of highly questionable democratic legitimacy. It affects a potentially violent ethical and spatial closure as highlighted throughout Chapter 4. Indeed, the image of fortress EU(rope) casts an imposing shadow over Habermas's legal constitutionalism.

A number of scholars and practitioners that are concerned with a democratic deficit in EU(rope) therefore do not accept Habermas's calls for a constitutional settlement, even as, in many cases, they seem to have been inspired by his discourse ethic, or at least a notion of deliberation that might be associated with such an ethic. These perspectives propose, then, not a 'statist-legal' but a 'deliberative-legal' cosmopolitan government, where the emphasis is placed on opening up to scrutiny the inputs of EU government in a far more radical fashion.<sup>3</sup> Practically, this often involves ensuring that all those affected by a particular governmental decision – in the jargon, all *stakeholders* – are party to a deliberative process that would make such a decision. While this might involve

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3 For an overview, see, Smith and Brassett, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives."

establishing particular procedures, those procedures themselves ought also be open to ongoing review. A 'deliberative-legal' rationality does not, therefore, emphasise the importance of a constitution, but, rather, the importance of *governance* – an omnipresent term in the study and practice of politics - at multiple and interconnected scalar levels. Such a rationality of government often claims not to choose between the governing imaginaries of market and state – and the associated expertise of economics and law – but rather to radically democratise the process of knowledge production itself. In this sense, it might be thought that such a rationality somehow overcomes the ethical pathologies associated with the promotion of a 'subject of interest' and 'subject of right'. It might, indeed, be claimed that given its radically plural and inclusive ethos, there is no substantive ontological condition of possibility for such a rationality of government and no associated attempt to promote a delimited subjectivity. Certainly these are the sorts of claims made by advocates of this governing rationality, as discussed in this chapter with reference to the promotion of a 'governance' agenda in/for EU(rope).

However, this part of the thesis highlights that a radical pluralism as 'deliberative-legal' cosmopolitan government is no ethical panacea. Indeed, the terms 'cosmopolitan' and 'government' serve to demonstrate that some condition is always already present within a radical pluralism. Such a rationality has emerged - as both theory and practice - due to certain contingent contexts and *necessarily* engages in the promotion of particular subjects. More specifically, this part of the thesis argues that to the extent that a cosmopolitan government in EU(rope) is constituted on the basis of a market cosmopolitan rationality (as claimed in Part I), the response of a 'deliberative-legal' government is always restrained in its potential to move beyond this rationality and the

subjects that it promotes. In other words, a market cosmopolitan rationality which constitutes the spatial and cognitive reality that is EU(rope) acts as a condition of possibility for the emergence of a 'deliberative-legal' cosmopolitan government of/for EU(rope). Moreover, the 'subject of interest' (specifically an entrepreneurial subjectivity) is often championed within the context of such governing modes, as discussed in detail in Chapter 6.

As a precursor to this fuller discussion of the aforementioned relationship between a 'deliberative-legal' and market cosmopolitan rationality, this chapter describes *one way* in which the democratic deficit has been recognised as an issue within the institutional rhetoric of European government itself – specifically within the European Commission – and traces the scholarly lineages of such a recognition. It proceeds in three sections. The first provides a brief genealogy of the notion of *governance*, noting that it has served a legitimating function in recent decades in the context of liberal government at various levels. The second section traces the emergence of a concern with governance in the EU via the work of the Commission's (now disbanded) internal think tank, the Forward Studies Unit (FSU) which influenced the 2001 White Paper on Governance and reads this in terms of a Habermasian discourse ethic of the sort discussed in Chapter 3. It is contended that the reflexive, procedural and deliberative implications of Habermas's communicative rationality are followed-through far more consistently in these texts than in Habermas's own prescriptions for post-national politics in Europe, discussed in Part II. The third section considers the extent to which the policy initiatives adopted by the Commission since 2001 cohere with the deliberative governmentality laid out by the FSU. It does so initially with reference to the Commission's own consultation and transparency

initiatives. Thereafter, it briefly turns to the promotion of 'soft' or 'new' governance in the EU via the OMC, which has been supported by certain political-theoretical accounts of deliberative democracy for its inclusive potentialities and has, indeed, been considered as a more faithful instance of a deliberative governmentality which promotes a *cosmopolitan* Europe. Such an assertion is critically assessed in Chapter 6.

### **Legitimacy via/of Governance: A Brief Genealogy**

#### *Governance as Description*

At the heart of many scholarly and practical responses to a perceived deficit in transnational and global democracy lies a discourse of 'governance'. This well used term can mean all things to all people in the study and practice of government and any attempt to define its meanings and comprehend its usages across all relevant domains of scholarship and practice is bound to fall short.<sup>4</sup> Indeed, the term has become a relatively unquestioned mainstay in the lexicon of government in modern times, used in relation to a variety of different scalar contexts and frequently invoked as that which overcomes an unproblematic political association with any such context. Related to this, the concept has transcended disciplinary boundaries; it has, for example, had the effect in both theory and practice of dissolving distinctions between international relations and comparative politics in political science. It is perhaps for this reason, that the notion of governance has

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4 Gerry Stoker, "Governance as Theory: Five Propositions," *International Social Science Journal* 50, no. 155 (1998).

been so popular in the study of the EU, which is so frequently conceived as a *sui generis* entity; a political system which is neither an international organisation nor a state.<sup>5</sup>

In terms of its dictionary definition, the term governance is synonymous with the idea of government and etymologically there is some logic in this; its roots can be traced to the same Greek origins. However, in social studies since the 1980s, governance has frequently been defined as something distinct from the concept of government as usually understood in political science – in contrast to Foucault's broader understanding (see above and Introduction) - as a hierarchical form of top-down rule by state institutions.<sup>6</sup> Historically, governance seems to have become a common term of usage for a range of practitioners, public and private, as a consequence of a perceived shift of authority from public state institutions of government towards a host of other sites, both domestically and internationally. Hence, in the 1980s, public policy and comparative politics scholars used the term to encapsulate processes such as privatisation and the delegation of authority away from the central state in many western states; what Rhodes describes as a shift from 'rowing' towards more 'steering' in public policy.<sup>7</sup>

The study of *global* governance in the disciplines of IR and IPE which emerged around the end of the Cold War, similarly rests on a broader notion of authority than one associated exclusively with the state. As Rosenau has it, "[g]lobal governance is

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5 For an overview, see, for example, Beate Kohler-Koch and Berthold Rittberger, "Review Article: The 'Governance Turn' in EU Studies\*," *JCMS: Journal of Common Market Studies* 44, no. s1 (2006).

6 Anne Mette Kjaer, *Governance* (Polity Press, 2004). p.6

7 R. A. W. Rhodes, "The New Governance: Governing without Government," *Political Studies* 44, no. 4 (1996). p.655

conceived to include systems of rule at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussions.”<sup>8</sup> Similarly, in EU studies, Marks and Hooghe’s conception of ‘multi-level’ governance has proved influential.<sup>9</sup> The concept of multi-level governance – and, indeed, the EU as multi-level governance reality - poses a challenge to realist and neo-realist analyses in the field of International Relations, where the unitary ‘state-as-billiard-ball’ is conceived as the primary unit of analysis. An interest in global governance, by contrast, shifts our attention towards the ways in which states and groups or networks of individuals have begun to cooperate transnationally in a number of issue areas including the economy, environment, international security and an array of more specific political issues. The very notion of global governance arguably poses serious questions about the naming of a field of studies as International Relations, which suggests the privileging of the nation-state in the domain beyond the domestic.<sup>10</sup>

In most mainstream accounts, practices of global governance are conceived as a necessary response to the unbundling of the relationship between sovereignty, territory and authority which historically converged around the nation-state.<sup>11</sup> This unbundling is thought to be caused by processes of modernisation and, in more recent terminology, globalisation, which produce conditions of interdependence as an extant reality.<sup>12</sup>

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8 James N Rosenau, "Governance in the Twenty-First Century," *Global Governance* 1, no. 1 (1995). p.13.

9 Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration*, Governance in Europe (Lanham, MD: Rowman & Littlefield Publishers, 2001).

10 Rosenau, "Governance in the Twenty-First Century.", James N Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton University Press, 1990).

11 Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations".

12 For early discussions of interdependence see: Joseph S. Nye and Robert O. Keohane, "Transnational Relations and World Politics: A Conclusion," *International Organization* 25, no. 3 (1971), Joseph S. Nye and

Indeed, globalisation is intimately connected with the notion of governance; it is the other side of the same coin, both its *raison d'être* and its *telos*. Modern accounts of globalisation which invoke the need for global governance often rely on a similarly functionalist argument to the early twentieth century calls for a European common market discussed in Chapter 2. Indeed, a functionalist/modernisation rationality remains of great legitimising import for post-national governance today. This leads to the teleological claim that interdependence - which arises from global governance, broadly conceived to include public and private actors - requires more global governance. Such a mode of thinking is exemplified, *inter alia*, in aspects of Giddens' policy-focused work, which has been influential in informing recent European policy as it emerges in the Lisbon strategy of 2000 (see Chapter 6).<sup>13</sup> As McLennan says, his later work on the third-way is characterised by "a kind of functionalism and teleology: the wired world is the coming world, driven by technological innovation and global restructurings, and we must simply tailor our values and politics to that end, which is on the whole a good one."<sup>14</sup> As noted in Chapter 2, a similar narrative constituted and has continuously legitimised the European integration project in general.

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Robert O. Keohane, "International Interdependence and Integration," in *Handbook of Political Science*, ed. Nelson W. Polsby and Fred I. Greenstein (Reading Mass.: Addison-Wesley, 1975).

13 Anthony Giddens, *Europe in the Global Age* (Cambridge, UK; Malden, MA, USA: Polity, 2007).

14 Gregor McLennan, "Travelling with Vehicular Ideas: The Case of the Third Way," *Economy and Society* 33, no. 4 (2004).



Walters and Larner claim that, "[g]overnance theorists [and, indeed, practitioners] tend to see different political scales as pre-existing, and argue that governance has involved a re-allocation of power to multiple agencies operating at these different levels."<sup>15</sup> Moreover, like Giddens, they often present such a 're-allocation' as a normative good in the sense that it involves a (re)-distribution of decision making capabilities. Indeed, global governance has been repeatedly presented as *the answer* to interdependence, an answer which it became increasingly possible to implement with the end of the Cold War. In most mainstream literature, global governance is not simply a disproof of realism, it is also presented as representing *progress* from the realist realities of international relations in the aftermath of the Cold War<sup>16</sup>; according to more hyperbolic prognoses, perhaps even progress towards "the end point of mankind's ideological evolution and the universalization of western liberal democracy".<sup>17</sup> Whereas state relations are conceptualised in terms of anarchy, self-help and coercion, literature on international organisation and global governance emphasises norms, consensus and collective action in the face of common problems.<sup>18</sup> In this sense, the notion of "governance without government"<sup>19</sup> has a positive normative edge to it, referring to the possibility for co-operation and action in the absence of an overarching authority or government. In such

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15 Larner and Walters, *Global Governmentality: Governing International Spaces*.

16 Martin Hewson and Timothy J. Sinclair, eds., *Approaches to Global Governance Theory* (SUNY Press, 1999).

17 Francis Fukuyama, "The End of History?," in *The National Interest* (Summer 1989). p.4.

18 Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State " *International Organization* 40, no. 4 (1986).

19 James N Rosenau and Ernst-Otto Czempiel, *Governance without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

imaginings international regimes and institutions, international law and global civil society allow for a move beyond a potentially violent international state of nature. For instance, in 1992, the Commission on Global Governance argued that, "international developments had created a unique opportunity for strengthening global co-operation to meet the challenge of securing peace, achieving sustainable development, and *universalizing democracy*." <sup>20</sup>

The usage of the term governance by a variety of international institutions and governments usually contains a similarly self-legitimising emphasis. Hence, governance of the sort described above in relation to domestic and global varieties, is often reconfigured as 'good governance'. However, as noted in Part I, a move towards post-national forms of government – and the emergence of governance structures associated with this – is not unambiguously positive; it can also involve an undermining of forms of democracy and solidarity (in general, legitimacy) associated with traditional nation-state government. To make good the label 'good governance' a number of scholars and, indeed, a host of international institutions, including the EU, have attempted to think through and implement forms of transnational governance which can be regarded as legitimate.

To take the example to which we return in this chapter, a 2001 European Commission White Paper describes the EU system of governance as being, "based on multi-level

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<sup>20</sup> "Our Global Neighbourhood: The Report of the Commission on Global Governance," (Commission on Global Governance, 1995). p.359.

governance in which each actor contributes in line with his or her capabilities or knowledge to the success of the overall exercise. In a multi-level system the real challenge is establishing clear rules for how competence is shared not separated; only that *non-exclusive vision* can secure the best interests of all the Member States and all the Union's citizens."<sup>21</sup> Such a non-exclusive system of multi-level governance is, according to this White Paper to pursue five core principles: openness, participation, accountability, effectiveness and coherence.<sup>22</sup> The ideals encapsulated in the terms are hardly contestable and the first three speak directly to the need to address a perceived democratic deficit. Nevertheless, as we will see in the remainder of this and the following chapter, such language often serves to conceal the fact that questions of 'effectiveness and coherence' actually preclude extensive openness or participation. Indeed, social scientific and public policy analyses frequently understand effectiveness as economic efficiency, often to the detriment of the deliberative democratic principles enunciated in this White Paper.<sup>23</sup> In other words a market cosmopolitan rationality delimits the possibilities of post-national democracy.

As Walters and Larner note, a Foucauldian approach "encourages a sensitivity to the complex geographies of power that give rise to 'scales', and indeed space more generally."<sup>24</sup> Indeed, from such a perspective, we can scrutinise extant schemes of governance not as exogenous to these scales or levels, but as constitutive of them. For

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21 European Commission, "European Governance: A White Paper," (Brussels: 2001). pp.34-5

22 Ibid.

23 For a succinct but comprehensive overview, see Liesbet Hooghe and Gary Marks, "Unraveling the Central State, but How? Types of Multi-Level Governance," 972 (2003).

24 Larner and Walters, *Global Governmentality: Governing International Spaces*. p.14.

instance, as discussed in Chapter 2, we are able to illuminate the fact that a 'European' economic space was constituted by government just as much as European government responded to the prior existence of such a space. We are also able to expose the particularity of the rationalities which produced various governing spaces. Hence, just as in the 1950s certain elites believed that the economy might be managed more *effectively and efficiently* on a larger, *European*, geographical scale so today regulatory governance advocates such as Majone (following in the footsteps of the ordoliberals), consider that the market should remain European government's fundamental *raison d'être*.<sup>25</sup> To return to the priorities for governance enunciated in the Commission White Paper, it can be said that, from the perspective of a still-prevalent market cosmopolitan government, a *particular* (increasingly neo-liberal) notion of *effectiveness* and *coherence* is understood to legitimately trump a concern with *openness, participation, accountability* (for an elaboration of this, see Chapter 6).

Nevertheless, as discussed above, not all institutional actors and scholars agree with this prioritisation. From a legal cosmopolitan perspective, some, such as Habermas, seek to emphasise an account of *effectiveness* rooted in the constitutionalisation of political *participation* which, as discussed in Part II, he believes would secure a more *social* Europe. As stated above, other, deliberative, legal cosmopolitans also emphasise the importance of *participation*, but not a constitutionally pre-empted participation. Rather they advocate a reflexive *openness* in the decision-making processes; for them a governing logic emerges

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<sup>25</sup> Majone, *Regulating Europe*.

through ongoing and continuous deliberation or a constant respect for the plurality of opinion. As discussed later in this chapter, this deliberative rationality is certainly projected in many of *the ideas* about governance that have been proposed by the contemporary EU.

### *Governance as 'New' Legal Cosmopolitan Government in Europe*

It should be noted that unlike those legal cosmopolitan accounts which focus primarily on outputs (such as Habermas on Europe), legal cosmopolitan accounts which focus primarily on inputs significantly refigure the social contract. Indeed, invoking the reality of globalisation, such accounts problematise notions of sovereignty and jurisdiction and claim that there is a need to rethink the very concepts of democracy and government (re-rendered as *governance*) as it has emerged in the context of a delimited nation-state.<sup>26</sup> As we have seen, Habermas and certain governmental actors seek to reassert those elements of the nation-state that they value in the context of post-national and, in particular, European-level, politics – that is solidarity rooted in consensus and, beneath the rhetoric, some residual cultural affinity. In contrast, accounts which focus on inputs implicitly question whether prevailing social realities – of globalisation and an associated cross-cutting social complexity or plurality – permit this Habermasian reassertion and/or whether such a reassertion is normatively desirable for the various reasons discussed in Chapter 4.

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26 Held and Archibugi, *Cosmopolitan Democracy: An Agenda for a New World Order*, David Held and Anthony McGrew, eds., *The Global Transformations Reader* (Polity Press, 2000). Bohman, *Democracy across Borders: From Demos to Demoi*, James Bohman and William Rehg, "Deliberative Democracy: Essays on Reason and Politics," MIT Press.

For example, Beck and Grande advocate a 'both-and' cosmopolitanism for Europe in the face of these perceived material realities. In other words, the aim should be a *cosmopolitan Europe* - rather than an oxymoronic *European* cosmopolitanism (that we have associated with Habermas) - where *both* loyalty to nation *and* loyalty to Europe (and, indeed, globally) is possible. This may involve reconsidering both the aims and logics of the European project and the very notion of *integration*, which draws on the imaginary of the nation-state in pushing for the 'harmonization' of policy by all member states. There is a sense then in which the integration process contributes to an abolition of difference through an assumption that "uniformity is a precondition for unity."<sup>27</sup> But such aspirations to uniformity have in practice often led to resistance of the sort manifest in public opposition to, for example, Maastricht or the Constitutional/ Lisbon treaty. Thus, in contrast to Habermas's call for closure – in particular in his manifesto and his support for a constitution (see Chapter 4) – Beck and Grande note that, "any further integration of Europe must be guided not by the traditional ideas of uniformity in a European federal state, but must take the *unalterable diversity* of Europe as its starting point."<sup>28</sup> This is to advocate a methodological cosmopolitanism in place of the zero-sum thinking of a methodological nationalism, which dominates the social sciences in general and considerations of the EU in particular.<sup>29</sup> As Rosamond notes, "this tendency to

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27 Ulrich Beck and Edgar Grande, "Cosmopolitanism: Europe's Way out of Crisis," *European Journal of Social Theory* 10, no. 1 (2007). p.73.

28 Ibid.(emphasis added).

29 See for example, Jachtenfuchs, "The Governance Approach to European Integration.", Markus Jachtenfuchs, "The EU as a Polity I," in *Handbook of European Union Politics*, ed. Knud Erik Jorgensen, Ben Rosamond, and Mark A. Pollack (London; Thousand Oaks Calif.: Sage, 2007), ———, "Democracy and Governance in the European Union," *European Integration Online Papers (EIoP)* 1, no. 2 (1997).

'familiarize' the EU might seriously downgrade its novelty, its distinctiveness and its potentially *transcendent* qualities."<sup>30</sup>

In relation to contemporary Europe and the EU, Beck and Grande do not shy away from the task of identifying and suggesting a number of "radical institutional and procedural innovations", which aim at promoting their 'both-and' cosmopolitanism.<sup>31</sup> They share with Habermas a desire to overcome Europe's democratic deficit, supporting a number of policies with which he would concur, *inter alia*: the establishment of a constitution, the use of well-designed pan-European referenda and the implementation of a set of anti-majoritarian institutional checks and balances - with which he would concur. However, whereas Habermas's politics lead him to emphasise the manner in which democratisation both depends upon and should be constitutive of greater consensus and solidarity, Beck and Grande stress the importance of preserving diversity, or Europe's uniqueness vis-à-vis the nation-state. An attempt is made throughout their institutional prescriptions to balance a respect for otherness with the integrationist imperatives of supranational problem solving. Notable concrete examples mentioned as compatible with this position include the principle of mutual recognition<sup>32</sup> - which permits the maintenance of legal variation as long as legal provisions are mutually compatible and therefore recognisable across EU borders - and the notion of variable geometry, whereby the integration process can vary in terms of its speed and participating members, as in the case of monetary union. Whereas Habermas seems to regret his own pragmatic designation of a 'core

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30 Ben Rosamond, "European Integration and the Social Science of EU Studies: The Disciplinary Politics of a Subfield," *International Affairs* 83, no. 2 (2007), p. 234.

31 Beck and Grande, *Cosmopolitan Europe* See, in particular, Chapter 8.

32 A principle emerging from the famous Cassis de Dijon case [elaborate]

Europe', which might act as vanguard to the currently reluctant integration process, for Beck and Grande a synonymous 'differentiated integration' actually reflects their cosmopolitan vision. For them this should not be considered as a second-best outcome or a 'last resort'; rather, it "is an indispensable precondition for realizing the recognition of otherness in cosmopolitan Europe."<sup>33</sup> Beck and Grande's is an apparently more sociologically grounded and *realistic* cosmopolitan approach, and yet, as noted, and as I will discuss in greater detail below, we might question the assertion that diversity, and, indeed, social complexity, are *unalterable* material features of the social world according to which governmental practices should be constructed, as well as the ethical implications of those practices that are constructed.

Institutionally, the EU has sometimes appeared to endorse this view of the social world and this may be precisely because different aspects of its multi-level system restrain each other such that the EU is more than international organisation but less than federal state. As stated above, within the EU's own institutional practice and discourse, deliberative governance is increasingly seen as an immanent, necessary and – if organised properly – *desirable* rationality of government, which corresponds with rather than resists, a prevailing social reality. Indeed, the EU, particularly the Commission, has explicitly promoted a procedural or deliberative form of governance - a deliberative governmentality – at least in its institutional rhetoric. Such moves mirror (and are informed by) the abovementioned empirical scholarly concerns with the *unalterable* complexities associated with globalisation and the promise of global governance and

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33 Beck and Grande, *Cosmopolitan Europe* p.245



corresponding normative concerns with the need to reconceive democracy. Due to the exigencies of globalisation, democracy can no longer be conceived wholly or even mainly as 'representative' or 'parliamentary'. Indeed, the notion of a self-legislating demos is problematised due to an extant border defying plurality which is resistant to the potentially homogenising (and simultaneously 'othering') tendencies in Habermas's prescriptions for EU(rope) (see Chapter 4). As discussed in greater detail below, the rhetoric of a deliberative or pluralist democracy also holds out greater political possibility for supranational agency in the sense that, on the one hand, it professes to respect national governments' differences and, on the other, can bypass national governments through invoking the importance of multi-level and multi-perspectival governance in the face of an incontestable pluralist rationality.

### **Conceiving a 'Deliberative-Legal' Cosmopolitan Government**

#### *The European Commission and Governance*

A deliberative or participatory governmentality is strongly promoted by the European Commission's FSU in a 1997 report on 'Evolution in Governance' and its implications for the Commission.<sup>34</sup> Merged with the Group of Policy Advisors in 2001, the FSU described itself as an in-house future-regarding think-tank of the European Commission. Certainly its reports are not entirely representative of the mainstream EU or Commission practice,

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34 Notis Lebessis and John Paterson, "Evolution in Governance: What Lessons for the Commission? A First Assessment," ed. Forward Studies Unit (European Commission, 1997).

as discussed below. However, neither was its work on governance entirely irrelevant to the Commission's efforts to legitimise itself and the EU more generally. Indeed, in 1999 President Prodi came to office on the back of the ignominious resignation of the previous Commission and found himself immediately confronted with a legitimacy crisis. One of his Commission's priorities was the promotion of good governance and, as an initial step, the publication of a White Paper on Governance. While many of the diagnostic and prescriptive insights of the early FSU reports did not find their way into the 2001 White Paper on Governance there is, nevertheless, a clear lineage from these reports, many of which were dusted off in view of the white paper.<sup>35</sup> Subsequently, the White Paper certainly impacted upon governance practice in the EU, particularly within the Commission itself, spawning a series of communications and plans which emphasise the importance of an inclusive or participatory mode of governance at the European level.<sup>36</sup>

What is particularly interesting for present purposes is the manner in which the FSU governance reports (particularly the 1997 report) conceive of the social world and

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35 Thanks are owed to Dr. John Patterson (co-author of the 1997 report, who worked on the FSU governance project throughout the late 1990s) for these important insights. In discussion, Dr Paterson noted that Jerome Vignon, former head of the FSU was responsible for co-ordinating the White Paper, but that this was still significantly 'watered down' as compared to the early FSU reports.

36 For example: European Commission, "Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission," (Brussels: 2002), ———, "Communication to the Commission from the President, Ms Wallström, Mr Kallas, Ms Hübner and Ms Fischer Boel Proposing the Launch of a European Transparency Initiative," (2005), ———, "Green Paper: European Transparency Initiative," (2006). ———, "European Transparency Initiative: A Framework for Relations with Interest Representatives (Register and Code of Conduct)," (Brussels: 2008), ———, "Communication: Follow-up to the Green Paper 'European Transparency Initiative'," (Brussels: 2007), ———, "European Transparency Initiative: The Register of Interest Representatives, One Year After," (Brussels: 2009), ———, "Communication on the Collection and Use of Expertise by the Commission: Principles and Guidelines," (Brussels: 2002), ———, "Ongoing and Systematic Policy Dialogue with Local-Government Associations," (Brussels: 2002), ———, "Communication from the Commission on Impact Assessment," (Brussels: 2002), ———, "Communication: Implementing the Community Lisbon Programme: A Strategy for the Simplification of the Regulatory Environment," (Brussels: 2005).

envisioning an appropriate mode of governance – and corresponding role for EU and Commission - in this context. In its formulation of governance, the task is not to change perceptions of EU outputs by arguing in favour of processes of marketisation (as for example in the case of the Birmingham Declaration's promotion of Maastricht discussed in Chapter 3), nor is it to revive the image of national democracy at European level. The aim is then, neither to convince the EU citizenry that the EU's market-oriented decisions and policies are in its interests nor to establish a constitution and bolster parliamentary practices via the European Parliament. Rather, the report emphasises complexity and uncertainty in the social world - in accord with a range of contemporary social and political theory on globalisation, interdependency, 'information' and 'network' society of the sort alluded to – in order to demonstrate the limitations of *government* as rooted in a fixed constitution and parliamentary order. At the same time it also rejects the narrow expert-driven technocratic vision of the market as organising principle. Indeed, social complexity leads to a sense that reality is never definitive, but contingent. As the report states: "[A]ll models of reality must be understood to be inherently contingent and unstable. Accepting this to be the case means that there is no single universal model of reality and equally no means by which we could eventually arrive at a definitive version of reality."<sup>37</sup> The view that knowledge is socially constructed, 'contingent' and 'unstable' leads the authors to advocate an inclusive, discursive and reflexive mode of governance, where proposed outcomes are contingent and subject to ongoing review. In supporting the notion that there may be no reliable Archimedean point upon which government can

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37 Lebessis and Paterson, "Evolution in Governance: What Lessons for the Commission? A First Assessment." p.13.

ground itself, government itself becomes a far less grounded endeavour. This does not, according to the report, mean that legitimate government is impossible, but flexibility and a related inclusiveness become two central features of legitimacy within the vision of 'new governance' offered.

These 'new forms of governance' are understood to be immanent in the context of extant limitations on national level government – wrought by globalisation - and manifest in realities of multi-level (including local and supranational) governance in situations of interdependence and complexity.<sup>38</sup> While parliamentary democracy at the national level may not be "as healthy as is often contended"<sup>39</sup>, "the emergent reality of new modes of governance" is presented as an opportunity for public actors in general and Commission in particular.<sup>40</sup> It is noted that the Commission itself has been involved in promoting new forms of governance to the extent that it has co-ordinated and mobilised networks, "organised along the lines of interest rather than on the basis of territory or nationality"<sup>41</sup>, particularly since the SEA. However, a recognition that knowledge is contingent requires that *the procedures* via which expert opinion is mobilised and engaged become a crucial gauge of governmental legitimacy. Indeed, "[i]n the context of complexity, of the pluralisation of explanatory models, of interdependency and of uncertainty, the centralised and *a priori* formulation of public problems (let alone solutions) as supposed by substantive rationality is rendered difficult."<sup>42</sup>

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38 Ibid. p.7.

39 Ibid. p.9.

40 Ibid. p.18.

41 Ibid. p.10.

42 Ibid. p.14.

Indeed, structures of “norm production and application” are enjoined to become more “diffuse, decentralised and flexible” and “a new definition of the principle of subsidiarity” is required.<sup>43</sup> Subsidiarity is not merely multi-level, but conceived as multi-scalar, overlapping and multi-perspectival. This requires of institutions such as the commission that they try to move beyond bureaucratic forms of functional specialisation, beyond “unilinear expert models upon which regulatory models have traditionally been based”<sup>44</sup> and at the same time seek to construe and *enable*, ‘context-specific’ networks involving a plurality of affected actors or ‘stakeholders’. The vision seems to be one of numerous, potentially overlapping, jurisdictions in a plurality of issue areas and has strong affinities with Beck et al.’s aforementioned vision of cosmopolitan Europe. Public actors ought not then impose “a particular understanding of the problem to be tackled nor the means by which they might be resolved.”<sup>45</sup> The public actor’s role is essentially to ensure the legitimacy of process through aiming at maximum inclusiveness and transparency in every case, although the means to achieve this may vary from case to case. The processes adopted are not to be one-off, but involve ‘feedback loops’, which account for changing circumstances, actors and, in general, complexity. Public actors “take on an auditing or oversight role which seeks to ensure the ongoing adequacy of the procedures and the attainment of collective objectives by the means agreed”. They do this by “controlling the *contextualisation* of the production and application of rules.”<sup>46</sup>

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43 Ibid. p.12

44 Ibid. p.17.

45 Ibid. p.18.

46 Ibid. p.19.

There are affinities between the new governance identified and advocated by the FSU and the work of contemporary cosmopolitan social theorists who highlight the interdependent, complex and plural nature of the social world. The view that governance *needs to be reformulated* in the terms described in the FSU report and that such governance is *immanent* are borne out of a conceptualisation of a complex social reality and the adoption of an associated cosmopolitan methodology of the sort discussed above with reference to Beck.<sup>47</sup> The FSU reports drew on the expertise of a number of legal scholars whose own work is clearly influenced by perspectives of the social world offered by such theorists as Luhmann and Habermas.<sup>48</sup>

At the same time, the reformulation of governance has affinities with more explicitly normative endeavours in the domain of political theory geared towards reinventing democracy within the complex terrain that is an increasingly globalised social world. Such a world is understood by political theorist James Bohman as one in which authority can increasingly impact upon or 'dominate'<sup>49</sup> unidentifiable individuals and political spaces (potentially from great distance). In this respect he highlights the profound

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47 Beck, *Cosmopolitan Vision*, Beck and Grande, *Cosmopolitan Europe*, ———, "Cosmopolitanism: Europe's Way out of Crisis."

48 Scholars directly involved in the FSU seminars which preceded the reports, or scholars who were clearly an influence (thanks to John Patterson for these insights and documents), included: Jacques Lenoble, Karl Heinz-Ladeur, Olivier De Schutter, Bernard Perret, Gunther Teubner and Christopher Hood. Again, thanks to John Patterson for sharing his information on these seminars. Note that Luhmann and Habermas, among others, are mentioned in much of the preparatory material for the seminars and are clear influences. See, for example, Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review* 17, no. 2 (1983).

49 Note that the term 'dominate' is not used in precisely the same way as Foucault.

difficulty of demarcating self-legislating communities in a radically interdependent social world (and the 'indefinite' nature of 'social interaction'), emphasising that all concerned persons should be able to contest and deliberate upon the exercise of global political power over them.<sup>50</sup> Bohman shares the FSU scepticism regarding hierarchically structured forms of government and appears to support the notion of inclusive formulation and re-formulation of processes. As he says, "[w]hile delegated authority need not be tyrannical or coercive, it easily becomes a form of domination when it fails to offer opportunities for *ex-ante* or *post-hoc* accountability."<sup>51</sup> He advocates the promotion of "multilevel institutions in which citizens are treated as having access to political influence at the inquiry stage of decision-making" and says that, "such inquiry provides a space for effective speech and action only if it is 'multiperspectival'".<sup>52</sup> In a similar vein, an FSU document of 1999, reporting the conclusions of a workshop on governance, argues that, "the entire policy process from the framing of problems, through the formulation of policy, its implementation, evaluation and revision needs to be opened up and liberated from the shadowy world it currently inhabits – civil society needs to be engaged in and by European action."<sup>53</sup>

Bohman notes, in particular, that it is "rule by experts and their theory-driven policies that permit little in the way of contestation, especially at the second-order level of

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50 James Bohman, "Republican Cosmopolitanism\*," *The Journal of Political Philosophy* 12, no. 3 (2004). p.340-1.

51 Ibid. p.346.

52 Ibid. p.347.

53 Notis Lebessis and John Paterson, "Improving the Effectiveness and Legitimacy of EU Governance: A Reform Agenda for the Commission," in *Forward Studies Unit Working Paper*, ed. Forward Studies Unit of the European Commission (European Commission, 1999). p.11-12

defining problems and their solutions."<sup>54</sup> Whereas the likes of Majone and the German ordoliberalists support the removal of contestation from post-national governance, for Bohman this is something to be normatively regretted. Indeed, in a similar move to the FSU, he promotes a deliberative or participatory understanding of democracy as enabling the opening of 'second-order' questions and bringing into question the dominance of *particular* experts on an ongoing basis. For the FSU, the aim is to "ensure that democracy genuinely becomes a process of *knowledge production* by and with those for whom that knowledge is deployed to serve and equally involving those actors in its deployment."<sup>55</sup>

The point of these comparisons is to highlight that this FSU vision of governance for public actors in general and the European Commission in particular, both draws from and promotes a sociological and normative lexicon or rationality which presents the social reality of globalisation as complexity and uncertainty regarding substantive and formal rationalities in the Weberian sense.<sup>56</sup> It is a lexicon, in other words, which offers a twin problematisation of the formal rationality of the market and the narrow expertise upon which it rests and also of the substantive rationality of the bureaucratic nation-state.<sup>57</sup> There is, to adopt the Foucauldian language developed in Chapter 1, an apparent desire to somehow move beyond the "*subject of interest*" and '*subject of right*' as all-encompassing governmental ontologies and towards an ontological reflexivity.

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54 Bohman, "Republican Cosmopolitanism\*." p.347.

55 Lebevis and Paterson, "Evolution in Governance: What Lessons for the Commission? A First Assessment." p.15.

56 As noted, it is also possible to trace the influence of Luhmann's systems theory in such accounts.

57 Thanks to John Patterson for these insights. See also, Held, *Introduction to Critical Theory: Horkheimer to Habermas* pp.249-350



According to Bohman, Habermas epitomises this empirical or sociological awareness: “[h]e has a deepening appreciation of the historical trends toward greater and ‘unavoidable’ social complexity.”<sup>58</sup> At the same time, he has a longstanding normative concern with the technocratic tendencies of the rationalities associated with both liberal capitalism and bureaucratic socialism. In theoretical terms, he promotes his discourse ethic as the ideal response to such a technocracy. In practice, however, he sometimes seems keen to revive something of the substantive rationality of the welfare state, as discussed at length in Part II. As Bohman puts it, “many faithful readers of Habermas may find his approach to legal and political legitimacy ...somewhat surprising. Rather than defending participatory democracy directly he instead embeds these radical democratic principles in a complex account of the political and legal institutions of constitutional democracies.”<sup>59</sup> In other words, he promotes a methodologically nationalist *European* cosmopolitanism. As hinted at in Chapter 3, this is explicable, *inter alia*, in terms of his pragmatic concern with sociology or the ‘facts’ of social reality; a concern, in other words, regarding the possibility of realising anything close to his discourse ethic globally in a social world characterised above all in terms of complexity, without the active drawing of certain boundaries – cognitive and spatial – which, for him, are constituted in law.<sup>60</sup> The discourse ethic, for Habermas, is to be regarded as an ideal via which institutions might be assessed, rather than the basis from which institutional proposals should be proffered, as he makes clear in his critiques of Rousseau and those

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58 Bohman, “Complexity, Pluralism, and the Constitutional State: On Habermas’s Faktizität Und Geltung.” p.898.

59 Ibid.p.897. Recall from chapters 3 and 4 that in his writings on post-national politics Habermas deploys the law as a constitutive mechanism establishing and reinforcing a European patriotism.

60 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*

who would follow him in promoting the ideal of direct democracy.<sup>61</sup> To promote such an ideal is, for Habermas, to adopt a naïve and even irresponsible stance towards social complexity.

Conversely, as has been noted, the possibility of delineating discrete political communities of fate – a European community in Habermas's conception (see Chapter 3) - is problematised in/by many whose similar view of the complex social world renders such boundary drawing itself democratically or ethically (see Chapter 4) problematic. Reading between the lines it seems that Habermas is regarded within such accounts as swimming against the tide of an ever more complex social reality in an effort at simplification. Such accounts are apparently less sceptical about the impact of such complexity on the normative potentialities of a discourse ethic. Examples of immanent forms of participatory modes of governance are presented both as evidence of and as the result of such understandings/ social forces. Normatively the response to such understandings/ social forces is to emphasise the importance of ongoing inclusiveness and deliberation in processes which establish rules and reach *contingent* policy decisions rather than *constitutional* agreements. From a deliberative perspective a Habermasian discourse ethic has more potential than Habermas himself would acknowledge and this precipitates a concern with process. The FSU appears to share such a view:

*From experience, it is clear that agreement and shared meanings are possible. But a mutual acceptance of the contingency of models and a mutual striving to*

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61 Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität Und Geltung."p.903

understand the models upon which others operate improves the value of reality constructions.... [T]he emphasis shifts away from improving information and action based on a dominant model, as in formal and substantive rationality, and towards a concern with *the adequacy of the procedures by which different models are exposed to each other, that is confronted with their own contingency and encouraged into a posture of collective learning.* In this way, *what is universal is less the content of models than the procedures which develop this understanding of contingency and the need for learning.*<sup>62</sup>

We see here the trace of a Habermasian discourse ethic; the notion that consensus or agreement is immanent in language or communicative action and that it is this possibility and the procedures permitting its emergence to which we should aspire. As Bohman says, with reference to Habermas,

The core of democratic legitimacy is thus not some metaphysical foundation in 'objective reason' but the creation of discursive conditions under which all can shape those decisions that affect them. *The validity of a decision would be related to 'rational consensus' to the extent that it passes a test of intersubjective universalisation: A norm is justified only if all could agree to it under ideal conditions.* In his moral and legal theory, Habermas calls this test 'the discourse principle'.<sup>63</sup>

Relating this to the FSU insights, it seems that the rationality of consensus (or policy output) is dependent upon the discursive conditions or the procedures adopted. It is not then some substantive conception of social justice or the formal calculative market (which, as we have highlighted, is itself based in a substantive conception of rationality), but the *quality* or *rationality* of deliberation which becomes the aim of government, its *raison d'être*, and that according to which government is to assess itself. From a

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62 Lebessis and Paterson, "Evolution in Governance: What Lessons for the Commission? A First Assessment." pp.13-14.

63 Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität Und Geltung." p.903 emphasis added

deliberative perspective, such a discourse ethic thus serves as a third way between the substantive rationalities of a 'subject of interest' and 'subject of right'.

## Realising a 'Deliberative-Legal' Cosmopolitan Government in the EU

### *Governance in/of the European Commission*

Governance is not only considered in abstract terms by an internal Commission think tank, the FSU, but also elaborated in practical terms within this institution. As noted above, in 2001 the Commission produced its White Paper on Governance, following lengthy consultations with a range of scholarly and institutional expertise, which laid out the core principles according to which EU governance should operate.<sup>64</sup> As noted, these were: *openness, participation, accountability, effectiveness and coherence*. The White Paper makes, among others, the following points:

The Union must renew the Community method by following a *less top-down approach* and complementing its policy tools more effectively with *non-legislative instruments*.

There needs to be a stronger *interaction with regional and local governments and civil society*.

[The Commission must].... [e]stablish a more *systematic dialogue* with representatives of regional and local governments through national and European associations *at an early stage in shaping policy*.

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<sup>64</sup> For a detailed critical assessment of the White Paper, see: Christian Joerges, Yves Meny, and J.H.H. Wieler, eds., *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (NYU School of Law: Jean Monnet Program, 2001).

..[b]ring *greater flexibility* into how Community legislation can be implemented in a way which takes account of regional and local conditions.<sup>65</sup>

The White Paper picks up much of the language of the FSU text and does mark a shift away from the view that EU legitimacy is to be regarded *entirely* in terms of outputs; in the jargon of regulatory governance, in terms of the (Pareto) efficiency of its regulatory policies.<sup>66</sup> More generally, EU government is not to be assessed entirely on the basis of its market-making and correcting functions. Dialogue, flexibility and participation are all the order of the day, at least in the rhetoric of this White Paper and, in a similar fashion to the FSU report, such features of governance are directly linked to its effectiveness and quality.<sup>67</sup> Reflecting a respect for difference and a recognition of extant plurality, there is also a clear vision of multi-level governance in the above, with statements on the importance of interaction with both civil society and regional and local government.

Certainly some practices of participatory democracy pre-dated this White Paper. For instance, the Amsterdam treaty contained provisions on consultation and articles on 'social dialogue' – with the involvement of the institutionalised advisory bodies, the Economic and Social Committee and Committee of the Regions as well as the Parliament - have been a longstanding feature of the treaty and governmental practice.<sup>68</sup> With Maastricht, the principle of subsidiarity institutionalised a respect for the status of local

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65 Commission, "European Governance: A White Paper." pp.4-6. Emphasis added

66 Majone, *Regulating Europe*.

67 Commission, "European Governance: A White Paper." p.10.

68 Note that Commission President Jacques Delors (see Chapter 3) was instrumental in establishing the social dialogue in the mid 1980s and this was formalised in the SEA and paved the way for the The Agreement on Social Policy (Maastricht) and social chapter (Amsterdam).

and national government at the European level. Moreover, in 2001 the Commission introduced the Interactive Policy-Making Initiative, a tool permitting the submission of comments by interested parties via the internet (this has been used in the context of the portal 'Your Voice in Europe').<sup>69</sup>

The White Paper sought then to formalise and "reinforce a culture of consultation and dialogue"<sup>70</sup> within the EU – and, in particular, the Commission – and set in motion efforts to ensure consistent practice in accordance with certain deliberative principles. Thus, for instance, in 2002 a Commission-wide framework for consulting interested parties was published, as were a set of principles and guidelines "on the collection and use of expertise by the Commission" and on "dialogue with local government".<sup>71</sup> "The overall rationale" of these initiatives was "to ensure that all relevant parties are properly consulted" at the policy-shaping stage.<sup>72</sup> As stated in the White Paper, standards on consultation should be designed to:

...reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of ad hoc consultations. These standards should improve the representativity of civil society organisations and structure their debate with the Institutions.<sup>73</sup>

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69 See: <http://ec.europa.eu/yourvoice/>. Accessed August 2010.

70 Commission, "Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission." p.3

71 ———, "Communication on the Collection and Use of Expertise by the Commission: Principles and Guidelines." ———, "Ongoing and Systematic Policy Dialogue with Local-Government Associations."

72 Commission, "Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission."

73 ———, "European Governance: A White Paper." p.17.

The consultation standards emphasise, then, the importance of transparent, open and inclusive processes in a manner not dissimilar from the FSU prescriptions, noting that such processes are important in terms of democracy and also “improve the quality of the policy outcome”.<sup>74</sup> The core principles enunciated in the White Paper are thus reflected in the Commission’s ‘minimum standards for consultation’. On ‘participation’, it is stated that, “[t]he Commission is committed to an inclusive approach when developing and implementing EU policies, which means consulting as widely as possible on major policy initiatives”. On ‘coherence’ such practices should be applied consistently throughout the Commission.<sup>75</sup> On ‘effectiveness’, it is noted that interested parties should be involved at an early stage of the policy development process, such that they are able to, “...have an impact on the formulation of the main aims, methods of delivery, performance indicators and, where appropriate, the initial outlines of that policy.”<sup>76</sup> And on ‘openness’ and ‘accountability’ it is noted that, consultation procedures must be “transparent, both to those who are directly involved and to the general public. It must be clear: what issues are being developed; what mechanisms are being used to consult; who is being consulted and why; [and] what has influenced decisions in the formulation of policy.”<sup>77</sup>

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74 ———, “Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission.” p.5.

75 Ibid. p.16.

76 Ibid.

77 Ibid.

With respect to 'transparency', efforts were furthered in 2005 with the launch of the European Transparency Initiative,<sup>78</sup> the publication of a Green Paper in 2006<sup>79</sup> the adoption of a Code of Conduct for Interest Representatives and a voluntary register for lobbyists in 2008.<sup>80</sup> By late 2009 the number of registrations had surpassed 2000, leading the Commission to declare the initiative a success.<sup>81</sup> The broad rationality underpinning the transparency initiative seemed to be that the Habermasian notion of 'intersubjective universalisation' alluded to in the FSU reports could be realised by ensuring that deliberative processes are inclusive, but inclusivity is itself guaranteed only via transparency and the open disclosure of interests by all those party to deliberation. As such, "[t]he Commission's consultation standards require that interested parties who wish to submit comments in the context of internet consultations must be prepared to provide the Commission and the public at large with information about their objectives and structure."<sup>82</sup> In concrete terms transparency means signing up to the on-line register and includes an all-important financial disclosure by these 'interest representatives'. From a deliberative perspective, such publicity might conceivably curtail the dominance of private sector interests alluded to in the context of the emergence of European government and mentioned explicitly in relation to the contemporary EU in Chapter 4. As Jon Elster has noted "[t]he presence of a public makes it especially hard to appear

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78 ———, "Communication to the Commission from the President, Ms Wallström, Mr Kallas, Ms Hübner and Ms Fischer Boel Proposing the Launch of a European Transparency Initiative."

79 ———, "Green Paper: European Transparency Initiative."

80 'Lobbyists' or 'interest representatives' were separated into three groups: professional consultancies and law firms; corporate lobbyists and trade associations; and NGOs and think-tanks, although in 2009 NGOs and think-tanks were put into separate categories. ———, "European Transparency Initiative: A Framework for Relations with Interest Representatives (Register and Code of Conduct)." ———, "European Transparency Initiative: The Register of Interest Representatives, One Year After."

81 Commission, "European Transparency Initiative: The Register of Interest Representatives, One Year After."

82 ———, "Communication: Follow-up to the Green Paper 'European Transparency Initiative'."



motivated merely by self interest."<sup>83</sup> This deliberative process will, according to the Commission discourse, ensure 'better' – reading between the lines, more *democratic* and more *effective* - decision-making or legislation.<sup>84</sup>

To some extent, the efforts of the Commission to promote participation and inclusivity from the White Paper onwards can be regarded as broadly consistent with the deliberative rationality promoted in the prior FSU reports on governance. However, the Commission has encountered difficulties in extending this rationality to the extent advocated by the FSU and by numerous scholarly advocates of post-national deliberative governance such as Bohman and Beck. Practical shortcomings in securing democratic government via institutional deliberation may be inevitable and a consequence of fundamental political/theoretical binds (as discussed further in Chapter 6). In this instance, they relate specifically to the clearly stated intention of the Commission to guard its monopoly role in policy initiative. Thus, for instance, within the aforementioned documents, the Commission makes it clear that it is the sole arbiter when it comes to deciding whether a consultation ought to be launched; as stated, "'consultations' means those processes through which the *Commission wishes* to trigger

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83 Jon Elster, *Deliberative Democracy*, Cambridge Studies in the Theory of Democracy (Cambridge: Cambridge Univ. Press, 1998). p.111.

84 That said, it should be noted that the Barroso Commission's reformulation of the 'Better Regulation' initiative in 2005 - set explicitly in the context of the Lisbon strategy's competitiveness agenda - has received criticism from environmental NGOs and trade unions for being purely business-driven and the product of a right-wing, pro-market Commission. In other words, they have critiqued the initiative for being governed primarily in accordance with a market cosmopolitan rationality. See, for example, Social Platform, "Move up a Gear for Sustainable Development! : Comments and Proposals for the 2006 Spring Council on the Lisbon Strategy," (Brussels: 2006). See also, Commission, "Communication: Implementing the Community Lisbon Programme: A Strategy for the Simplification of the Regulatory Environment." For more on the Lisbon strategy and its implications for/ relationship with a deliberative governmentality in the EU see Chapter 6.

input from outside interested parties".<sup>85</sup> In practice, consultations are launched when it is deemed by the Commission that an 'extended impact assessment' is required for a particular policy.<sup>86</sup>

Even when consultations are launched they may not meet substantive deliberative criteria. As stated in one of the aforementioned Commission communications: "the Commission must emphasise that consultation can never be an open-ended or permanent process. In other words, there is a time to consult and there is a time to proceed with the internal decision-making and the final decision adopted by the Commission."<sup>87</sup> And later: "*only the College of Commissioners* is entitled to weigh up the pros and cons put forward in a consultation process and to adopt a final position in the Community interest."<sup>88</sup> Moreover, as regards the feedback the Commission can provide following a consultation, it is stated that, "[t]he idea of providing feedback on an individual basis (feedback statements), as requested by some contributions, is not compatible with the requirement of effectiveness of the decision-making process."<sup>89</sup> We begin to see here the limitations of the Commission's apparently participatory and inclusive approach; in practice it lacks the reflexivity – particularly the notion of feed-back loops, policy differentiation and ongoing revision and adjustment - advocated by the FSU and

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85 Commission, "Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission." 15 emphasis added

86 "In deciding the Commission will inter alia take the following criteria into account: Whether the proposal will result in substantial economic, environmental and/ or social impacts on a specific sector or several sectors, and whether the proposal will have a significant impact on major interested parties; Whether the proposal represents a major policy reform in one or several sectors." ———, "Communication from the Commission on Impact Assessment." p.7.

87 ———, "Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission." p.11

88 Ibid. p.12.

89 Ibid.

numerous deliberative scholars.<sup>90</sup> In its defence, it might be argued that the Commission has sought to establish a role for itself as the organisation which merely audits the adequacy of procedures in the manner advocated by the FSU. Moreover, with the Lisbon treaty, the EU has introduced a 'citizens' initiative', whereby one million citizens from any number of member states will be able to ask the Commission to bring forward a proposal in any of the EU's areas of responsibility.

That said, in practice the Commission remains structurally bound to play a far greater role in European government than a substantive deliberative governmentality might grant it. Indeed, the Commission's de-limited vision of consultation operates within the constraints of the so-called Community method, which grants the Commission a monopoly on the right of initiative in so-called first-pillar areas, which includes the 'economic constitution' described in Chapter 2. The method operates in accordance with an integrationist logic in such areas and thereby constrains any deliberative debate from the outset (see Chapter 6 for more on this). For now, suffice to say that the Commission is not only legally and institutionally bound to fulfil its role as policy initiator, but in the White Paper explicitly defends the role and, arguably, calls for the expansion of its executive function in a manner that is not compatible with its ostensible promotion of a deliberative ideal.<sup>91</sup> The Community method, at least in traditional guise, tends to

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90 In Chapter 6 it is argued that the power maintained by the Commission is, pace the FSU and deliberative scholars, actually intrinsic to government itself and therefore unavoidable. Indeed, the deliberative discourse adopted by the Commission - particularly since the White Paper - may, despite the declarations of transparency, conceal more than it reveals in terms of the power and politics at play in European-level government.

91 On this, see in particular, Daniel Wincott, "Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union," *Journal of Common Market Studies* 39, no. 5 (2001). p.903.

involve the establishment of a 'hard law' and in the White Paper, the Commission is clear that 'regulations' – the 'hardest' legislative instrument - ought to be more widely used where legal certainty and uniformity *are needed*; notably, in areas relating to the internal market.<sup>92</sup> Consequently, policy in such areas can tend towards a uniformity in policy output. This is a uniformity of which, as noted above, some cosmopolitan scholars such as Beck et al. are critical because it is thought that insufficient respect is granted to extant difference.<sup>93</sup>

Thus, while Commission consultation might ensure a deliberative element prior to legislative decisions being made and the principle of subsidiarity might constrain the temptation towards excessive government at the European level, it could still be argued that, due to its production of 'hard law', the Community method fails to permit flexibility in terms of policy differentiation and policy implementation among and within different member states.<sup>94</sup> Indeed, the concept of 'hard-law' might be associated with a Habermasian methodological nationalism of the sort Beck et al. critique. Due to such limitations, some advocates of deliberative governance have advocated the use of 'soft' law in post-national governance. In the European context, they have looked beyond the community method in order to find examples of immanent deliberative democracy. In particular, a number of scholars have held-up the OMC as a more plausible example of

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92 Commission, "European Governance: A White Paper." 20

93 However, it ought to be noted that the White Paper does also note that 'framework directives' should be used more frequently. These "texts are less heavy-handed, offer greater flexibility as to their implementation, and tend to be agreed more quickly by Council and the European Parliament." It also notes the increased importance of so-called 'co-regulation' which combines legislative action "with actions taken by the actors most concerned." Ibid. p.21.

94 For an overview of hard and soft law in post-national governance, see, for example, Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2003).

deliberative governance in contemporary EU practice. The following section turns to consider whether the OMC might correspond with the deliberative governmentality advocated in the FSU's work on governance to a greater extent than the Commission's efforts at introducing a consultative aspect into the Community Method.

### *The Open Method of Co-ordination as Deliberative Governmentality?*

As noted in the previous section, the Commission's efforts to promote 'governance' according to the core principles laid out in the White Paper fall short of the FSU vision to the extent that – notwithstanding the practice of consultation – the Commission is, and promotes itself as, a privileged agent in dictating a uniform policy for the EU in accordance with the Community method. As stated, a concrete technology of government at the European level which might better fit with the FSU's deliberative governmentality and Beck's vision of flexible integration is the OMC. This method in a sense offers *more* governance; it provides a way of integrating networks – prevalent and often celebrated in orthodox approaches to local and national level public policy – into supranational level governance. In theory, the OMC includes all relevant representatives from government and non-government in a deliberative learning process. From a deliberative perspective, its added value as compared with consultation practices in relation to the community method, lies in its establishment of only very general and loose strategic guidelines at EU-level, which member states are encouraged to follow, but in their own particular way and without legal coercion. As stated in the EU Lisbon Council Presidency Conclusions:

This method, which is designed to help Member States progressively develop *their own* policies, involves: *fixing guidelines* for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; establishing, where appropriate, *quantitative and qualitative indicators and benchmarks against the best in the world* and tailored to the needs of different Member States and sectors as a *means of comparing good practice*; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, *taking into account national and regional differences*; *periodic monitoring, evaluation and peer review*.<sup>95</sup>

The Governance White Paper, published the year after Lisbon, notes the increased importance of softer, more flexible instruments, including the OMC. As Wincott notes, "[i]nstead of seeing 'soft law' as a second best policy instrument to be used as a stepping stone to binding law, the White Paper signals the Commission's view of non-binding policy instruments as a permanent feature of the EU."<sup>96</sup> Nevertheless, as noted above, it is the Community method that is ultimately privileged in the White Paper, described as the 'model for the future'.<sup>97</sup> As such, the White Paper's acceptance of the OMC is delimited – or 'distinctly muted' – and this is reflected in the Commission's stated preference for the deployment of the Community method whenever possible.<sup>98</sup> Thus, while the OMC has been increasingly accepted in EU discourse, there is much equivocation (at least from Commission) regarding its place and purpose and this is reflected in the Commission's similarly half-hearted embrace of the FSU's deliberative vision of 'governance'.

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95 European Council, "Lisbon European Council Presidency Conclusions," (Lisbon: 2000).

96 Wincott, "Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union." p.900.

97 Commission, "European Governance: A White Paper." p.34. See also, Wincott, "Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union." p.901.

98 With the Commission (arguably problematically) presented as arbiter of 'the possible'. See Wincott, "Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union." pp.907-8.

In contrast, a number of deliberative legal cosmopolitan scholars – including Bohman and Beck – *do* champion the OMC for its adherence, or, rather, its *potential to adhere*, to something like a transnational deliberative vision of governance, or, in the FSU's discourse, 'new governance'.<sup>99</sup> Bohman notes that "[m]ultiperspectival inquiry could be taken a step further in the EU beyond comitology in creatively employing its 'Open Method of Coordination' (OMC)."<sup>100</sup> For Beck and Grande, "this method is extremely hospitable to national, regional and local differences because it places them under the protection of the sovereign member states"<sup>101</sup> and, going much further than the Commission White Paper, they argue that the OMC offers one way "out of the dead end of the Community Method."<sup>102</sup> Such a method can be conceived as an innovation which coheres with Beck and Grande's conception of a *cosmopolitan* Europe as distinct from Habermas's *European* cosmopolitanism; it corresponds with a more plural rationality of government respectful of extant difference. Indeed, in a practical sense, the OMC allows the EU to address policy areas where there is not sufficient consensus among member states to use the Community Method; typically policy areas associated with social policy

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99 See, for example, the positive review of the OMC in Beck and Grande, "Cosmopolitanism: Europe's Way out of Crisis.". See also, David M. Trubek and James Mosher, "New Governance, EU Employment Policy, and the European Social Model " in *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* ed. Christian Joerges, Yves Meny, and Joseph H.H. Weiler (Jean Monnet Working Paper No.6/01, Symposium, 2001). James Bohman, "Constitution Making and Democratic Innovation: The European Union and Transnational Governance," *European Journal of Political Theory* 3, no. 3 (2004). pp.332-3. Joshua Cohen and Charles Sabel, "Sovereignty and Solidarity in the EU," in *Governing Work and Welfare in a New Economy: European and American Experiments*, ed. Jonathan Zeitlin and David Trubek (Oxford: Oxford University Press, 2003). ———, "Directly-Deliberative Polyarchy," *European Law Journal* 3, no. 4 (1997). Burkard Eberlein and Dieter Kerwer, "New Governance in the European Union: A Theoretical Perspective," *JCMS: Journal of Common Market Studies* 42, no. 1 (2004).

100 Bohman, "Constitution Making and Democratic Innovation: The European Union and Transnational Governance." p.332.

101 Beck and Grande, "Cosmopolitanism: Europe's Way out of Crisis." p.75.

102 ———, *Cosmopolitan Europe* p.248

or so-called 'positive' integration.<sup>103</sup> Areas which are not related to a market cosmopolitan rationality and might, indeed, even temper the effects of such a rationality.

Consequently, the OMC has also been linked with the possibility of rejuvenating the 'European Social Model' promoted by scholars such as Habermas and important institutional actors such as French policy makers (see Part II). One area in which French actors (among others) such as Lionel Jospin and Jacques Delors were partially successful in the *constitutionalisation* of a more social Europe, was in their successful pursuit of an employment chapter at Amsterdam in 1997, establishing employment as a new priority on the EU agenda alongside growth and stability.<sup>104</sup> Their success in this regard may have been linked to the fact that Employment, with the European Employment Strategy (EES), became the first policy area in which something like the OMC was deployed (although the method was not formally named as such until the unveiling of the Lisbon strategy of 2000). In other words, member states could agree to general principles on employment without having to produce substantive regulations or directives in this policy area. The EES and the OMC were at the heart of the Lisbon strategy when the notion of a European social model again emerged as an important legitimising discourse.<sup>105</sup> Since the official origin of the OMC in 2000, this new mode has been deployed in an array of policy areas, including: social inclusion (Nice 2000), pensions

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103 Caroline de la. Porte, "Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?," *European Law Journal* 8, no. 1 (2002).

104 Clift, *French Socialism in a Global Era : The Political Economy of the New Social Democracy in France*. p.181.

105 Wincott, "The Idea of the European Social Model: Limits and Paradoxes of Europeanisation." p.281.



(Stockholm 2001)<sup>106</sup>, health care (Gothenburg 2001), research and innovation (Spring European Council 2003) and numerous other OMC-like processes in information society, enterprise and e-business and education and climate change.<sup>107</sup> In practice, there are a variety of soft modes, with each policy field involving different levels or types of co-ordination. Both the newness and the singularity of the OMC might be questioned given these differences in implementation in a variety of policy areas and the fact that it actually predates its consolidation at Lisbon in 2000. However, "the OMC appears novel to the extent that it (re)names and consolidates an emerging tendency in EU governance".<sup>108</sup> This is the tendency towards the promotion of governance as deliberative, multi-perspectival and pluralist.

Moreover, the fact that it is promoted as such at Lisbon, signifies that such a tendency is perceived by the institutions themselves to have a certain political and normative appeal, in accordance with the more general 'governance' agenda enunciated above. For current purposes, it is particularly important to emphasise that the promotion of a deliberative governmentality via the OMC might be thought to promote not only a more democratic and difference-respecting European government, but also a greater *social* purpose for European government. And it might be regarded as both more effective and *realistic* than calls for the promotion of a 'hard' legal European constitution of the sort espoused by

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106 Patrizia Nanz and Caroline de la Porte, "The OMC - a Deliberative-Democratic Mode of Governance? The Cases of Employment and Pensions," *Journal of European Public Policy* 11 (2004).

107 Martin Rhodes and Manuele Citi, "New Forms of Governance in the European Union," in *Handbook of European Union Politics*, ed. Knud Erik Jorgensen, Mark A Pollack, and Ben Rosamond (London; Thousand Oaks Calif.: Sage, 2007).

108 Daniel Wincott, "Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon?," *Public Administration* 81, no. 3 (2003).

Habermas.<sup>109</sup> As alluded to, the respect for difference permitted by the OMC allows European level government to implicate itself in policy areas where a constitutional consensus does not exist; indeed, the OMC, in theory, does not require such a consensus.

Thus, it could be argued that the OMC, notwithstanding any current shortcomings, might represent the sort of deliberative governance prescribed by the FSU. It might offer a practical third-way between the extremes of market and a 'statist-legal' rationality of the sort that has been associated with Habermas's work on Europe. Following through on a Habermasian discourse ethic in a manner more consistent than Habermas himself, the OMC and the deliberative rationality underpinning it might offer the best hope of addressing the EU's democratic *and social* deficit. That said, Habermas's reluctance to adopt this line in his own interventions on Europe might be one reason for pause. Indeed, we might question the designation of this new governance as the harbinger of deliberative democracy and solidarity in Europe. Moreover, we might wonder whether a deliberative governmentality – as enunciated by FSU and deliberative scholars - is really able to transcend the potential ethical closures of either a market or legal-statist cosmopolitanism, as its advocates claim. Such questions are considered in some detail in Chapter 6.

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109 Trubek and Mosher, "New Governance, EU Employment Policy, and the European Social Model".

## Conclusion

This chapter has sought to elucidate a 'deliberative-legal' cosmopolitan government that is manifest in an array of scholarship and also within the discourses of European level government itself, specifically the 'Governance' reports of the FSU. In this respect it offers an embedded description of a radical pluralist understanding of political cosmopolitanism (enunciated in Introduction) via a description of *one* attempt to instrumentalise such a rationality in the realities of post-national government in EU(rope).

It is often claimed that such a rationality is inherently respectful of plurality, to the extent that knowledge itself is rendered contingent. Certainly, the 'governance' reports of the FSU - informed by a range of political and legal theorists - present knowledge in this way and therefore advocate a focus on the establishment of *fair* democratic procedures that ensure a legitimate process of knowledge production or decision making. Attempts to put this 'deliberative-legal' rationality into practice are apparent in the efforts of the Commission to promote 'governance' with its White Paper of 2001 and in its subsequent establishment of internal consultation standards and a transparency initiative involving the registration of a variety of lobbyists. To the extent that these Commission efforts have been associated with the rigidities of the Community Method – and a 'hard' law - it is argued that they fall short of fulfilling the deliberative vision of governance spelled out by the FSU.

A more successful approximation of this vision may, it is argued, be apparent in the EU's deployment of an OMC – or 'soft' law - in an increasing number of policy areas. Indeed, a range of scholars that advocate a deliberative or radically plural democracy in/for EU(rope) have highlighted the immanent potentialities of such a mode of government. However, as alluded to at the end of the foregoing section, while the OMC might represent a much closer approximation of the FSU vision for European governance, it fails to entirely displace the Community Method. Indeed, its ostensible 'openness' is necessarily foreclosed by a prevalent rationality of government.

More than simply describing the attempts of the Commission to conceive of and realise a 'deliberative-legal' cosmopolitan government, this chapter has, then, also sought to highlight the limitations to such a rationality in this specific context. Such an analysis alludes to the conditions of possibility surrounding the manifestation of a 'deliberative-legal' rationality in EU(rope), as a precursor to a more detailed discussion of such conditions – in both theory and practice - in Chapter 6. In the following chapter, I seek, in particular, to illustrate such conditions by considering the specific complexes of power/knowledge within which the OMC operates. An analysis of certain usages of the method, the context in which it was born and certain of its applications allows us to get a better grasp of the possibilities, limits and ambiguities of a deliberative governmentality and, indeed, of cosmopolitan government more generally. Indeed, it will be shown that the method has, for the most part, been put to the service of the prevalent market cosmopolitan rationality and economic constitution elucidated in Part I.

## Chapter 6: Securing Legal Cosmopolitan Government II: 'Subject of right' meets 'Subject of interest'

### Introduction

As highlighted, a 'deliberative-legal' governmentality is but one imaginary of legal cosmopolitan government at the European level, which co-exists and sometimes conflicts with the imaginary of the nation-state as manifest both in the existing nation-states of Europe and in conceptions of Europe *as nation-state* promoted in the theory and practice highlighted in Part II. It also co-exists and potentially conflicts with the market cosmopolitan rationalities described in Part I, in its refusal to privilege particular *inputs* or knowledges associated with the economy. Indeed, to the extent that it challenges the prevalence of expert rationalities associated with both nation-state (law) and market (economy), a 'deliberative-legal' rationality or an associated discourse of governance is often presented as a 'third way' or a *via media* between these extremes. However, this thesis has argued that government – in Foucault's sense of 'the conduct of conduct' – is unable to avoid the privileging of a particular subjectivity as both condition of possibility and telos. This chapter offers, then, a critique of a 'deliberative-legal' cosmopolitan rationality of government - or a radical pluralism (see Introduction) - that has been held in such high stock in both the theory and practice of post-national government. It does this through highlighting its conditions of possibility and the subjectivities that it promotes in theory/ practice. Embedding this discussion in the realities of EU(rope) and its contemporary government brings to life the frequently unacknowledged difficulties of such a rationality.

This chapter argues that when it is instrumentalised, a 'deliberative-legal' rationality (that follows through more fully on the Habermasian discourse ethic than does Habermas in his own political interventions) necessarily involves the promotion of particular subjects. Indeed, to recall, this is a discourse ethic that is always already rooted in an ontology; it is grounded in the *possibility of consensus* that, it is claimed, is immanent in language. Thus, even as a 'deliberative-legal' rationality appears to reject the notion of a substantive juridical constitution, the idea of a constitution as a manifestation of consensus (see Chapter 4) remains present in the very notion of this consensual possibility. Indeed, such consensus relies on a conception of reasonableness or rationality that itself may enact an ethical closure.

More specifically, in the context of a EU(rope) that was constituted by a market cosmopolitan rationality, any attempt to implement a proposal for an open deliberative governance in/of EU(rope) must effectively defer to the notion of reason imbued in this market rationality. In other words, it co-exists with and is preconditioned by the economic constitution that made EU(rope) in its current form both seeable and sayable. This is reflected in practice, where the ostensibly 'open' method of co-ordination is put to the operation of a market cosmopolitan rationality that privileges a competitiveness agenda and an associated entrepreneurial subjectivity of the sort discussed with reference to Foucault's genealogy of liberal government in Part I. This is not to argue that resistance to a market cosmopolitan rationality is impossible; indeed, the chapter highlights a number of extant examples of such resistance. As discussed in Chapter 1,

liberal government offers a space of uncertainty, which allows for civil society to be much more than the market subjects that liberal government, above all, seeks to promote.

That said, the chapter seeks to emphasise the often unrecognised *limits* to such resistance – or such critique - when it is grounded in a ‘deliberative-legal’ cosmopolitan rationality that asserts a particular conception of *reasonableness* as the condition that enables consensus to emerge. More concretely, it draws attention to the fact that the *particular* conception of reasonableness deployed by those ‘deliberative-legal’ actors seeking to impact upon the government of EU(rope) is grounded in a conception of the social world – as globalisation and complexity - that was largely constituted by market cosmopolitan rationalities. In other words, the civil society that ‘deliberative-legal’ advocates often privilege as the agents of government-qua-governance are not entirely disconnected from the framing discourse of a market cosmopolitan government. There are, of course, as mentioned above, good reasons for not seeking to assert Habermas’s substantive constitution in the face of a market cosmopolitan government, but a ‘deliberative-legal’ rationality - to the extent that its ‘civil’ society implicitly defers to the imaginaries of market cosmopolitan government - may do little to challenge the status quo of a market cosmopolitan post-national government. I return, then, in this final chapter to a discussion of the *ambiguous relationship* between a ‘subject of interest’ – associated with the market – and a ‘subject of right’ – associated with social contract.

The chapter proceeds in three main sections. In the first it continues the assessment of the OMC begun in Chapter 5 and argues that, *in practice*, it has not cohered with the deliberative ideals enunciated in that chapter, but has, in fact, been deployed in a manner

that is deferential to a prevailing market constitution and may, indeed, even extend its logic. In the second section I explore the particular policy areas in which it has been deployed and, in particular, note how these can be associated with the promotion of *entrepreneurial* subjectivities 'all the way down'. It is argued that while the entrepreneur is promoted and valued in European institutional discourses (s)he remains, essentially, an uncertain figure. The third section explores whether, more generally, *new governance* is, necessarily, constitutive of market cosmopolitan rationalities – whether a deliberative governmentality necessitates the privileging of the market - or whether the OMC is merely a flawed application of the FSU ideal. It does this via a critical analysis of deliberative government's central agent; that is, civil society. It is argued that, on the one hand, governance or a 'deliberative-legal' cosmopolitan government, allows space for the resistance of market rationalities, while, on the other hand, the very cosmopolitan vision of the social world upon which a deliberative governmentality is presaged and within which civil society operates is itself co-constitutive of the market. Indeed, we find ourselves at the heart here of the paradox of liberal government elucidated by Foucault and described in Chapter 1. This is a paradox that is illuminated in the ambiguous meeting of '*subject of right*' and '*subject of interest*'.

## **The OMC and Market Cosmopolitan Government: Constituting the Entrepreneur**

### *OMC and Neo-liberal 'Best Practice'*

The ostensibly *open* method may be less open than the institutional rhetoric and its proponents – briefly discussed in Chapter 5 - would claim. As the Commission White



Paper says, "the use of the [open] method must not upset the institutional balance nor dilute the achievement of common objectives in the Treaty."<sup>1</sup> As elaborated in Chapter 2, these common objectives have emerged via, *inter alia*, an economic constitutionalisation of policy, which contemporaneously has promoted a mode of government geared towards the expansion of market rationalities. Thus, while the White Paper picks up much of the rhetoric of deliberative democracy, it, perhaps unsurprisingly, falls short of the radicalism of the FSU texts. As noted in Chapter 5, in accordance with its desire to preserve the existing treaties it emphasises the continued importance of the Community method or 'hard' law, which is the target of much of the FSU report's critique due to its top-down, expert driven tendencies. This is a method, of course, in which it is the expertise of the Commission – often an expertise rooted in a market cosmopolitan rationality - which is of central importance, so it is hardly surprising that the White Paper asserts its importance. As Kohler Koch summarises, the "White Paper ... is biased in favour of efficiency and effectiveness, and reflects an understanding of 'good governance' that neglects basic principles of democratic legitimacy."<sup>2</sup> In other words, in some ways it merely reinforces the regulatory, market making function of the EU that for many represents the core of its legitimacy deficit. The potential of the OMC is thus constrained by the extant constitution; the extant relations of institutional power.

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1 Commission, "European Governance: A White Paper." p.22. emphasis added

2 Beate Kohler-Koch, "The Commission White Paper and the Improvement of European Governance," in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, ed. Christian Joerges, Yves Meny, and J.H.H. Weiler (Brussels: The Jean Monnet Centre for International and Regional Economic Law and Justice, 2001).

The domain in which deliberation is possible within the OMC is delimited by a neo-liberal economic constitution which consists, *inter alia*, of a constitutionalised monetary policy at EU level<sup>3</sup> that accords with ordo-liberal austerity principles elucidated in Part I. Thus, in the arena of employment policy - the original arena in which the OMC was used as a governance method – the discussion is not open in the sense that it can scrutinise the full range of economic policy that could be utilised in this area. As Scharpf notes, “if unemployment rises in the Euro area generally, Luxembourg EES guidelines could not recommend lower ECB interest rates; if unemployment rises nationally, EES recommendations could neither relax the deficit rules of the SGP nor the competition rules on state aid to depressed regions or industries.”<sup>4</sup> In reality, then, employment (and the open method for promoting it) was not on a par with stability as enunciated in the Amsterdam treaty and the very use of a soft mode of governance arguably reflected its relative unimportance. Neither was employment on a par with growth or competitiveness. Indeed, a focus on employment and social policy at EU level became primarily a tool for pursuing both, particularly after the Lisbon agenda established European competitiveness as an explicit overarching strategic goal for the EU; above all, Lisbon is concerned with rendering Europe the most ‘competitive knowledge based economy in the world’. This agenda is itself framed in terms of the recognition that, “[t]he European Union is confronted with a quantum shift resulting from globalisation and the challenges of a new knowledge-driven economy” and by a “rapid and

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3 Gill, "European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe."

4 Fritz W. Scharpf, "The European Social Model," *Journal of Common Market Studies* 40, no. 4 (2002). p.655.

accelerating pace of change".<sup>5</sup> Thus, just as calls for governance in general usher forth the image of globalisation as exogenous force, so too does this agenda, in order to justify its focus on European competitiveness.

In other words, the very weakness of the OMC in the face of a constitutionalised market cosmopolitanism – its inability to counter an ordo-liberal-inspired monetarism and its unveiling in the context of the Lisbon competitiveness agenda – means that those social policy areas where it has been deployed have been reconceived in terms of this rationality.<sup>6</sup> While it is true, then, that the method has allowed European level government to say something about social policy, it is important to reflect on what precisely it has said; what kind of social policy has it promoted? As noted in relation to employment, it seems clear that social policies are already in some sense enjoined to march to the tune of a neo-liberal monetarist agenda.<sup>7</sup> There is here a mirroring of a more general trend where, increasingly 'new welfare' regimes privilege a 'third way' politics (in the specific sense of an Anthony Giddens or New Labour, rather than in the general sense of a 'deliberative-legal' 'governance' discussed in Chapter 5).<sup>8</sup> As Jayasuriya says, "to see this new welfare governance as a part of a movement back from economic to

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5 Council, "Lisbon European Council Presidency Conclusions."

6 Such tendencies are likely to become even more pronounced in the context of a general tendency towards austerity with the sovereign debt crisis. At EU level, this is manifest in efforts to reinforce the SGP (see Chapter 3) and the 'Europe 2020' successor to the Lisbon strategy promotes a 'social market agenda' that does not mark a departure from Lisbon in terms of social policy orientation. See, *inter alia*: ———, "Presidency Conclusions." European Commission, "Enhancing Economic Policy for Stability, Growth and Jobs - Tools for Stronger Economic Governance," (30 June 2010). ———, "Communication: 'Europe 2020': A Strategy for Smart, Sustainable and Inclusive Growth," (2010).

7 Armin Schafer, "Beyond the Community Method: Why the Open Method of Coordination Was Introduced to EU Policy-Making," *European Integration online Papers (EIoP)* 8, no. 13 (2004).

8 Although the use of 'third way' in relation to a deliberative governmentality is intended to denote at least some resemblance with Giddens's more explicitly political statement. Both are presented as a middle way between the market and the (welfare) state and the rhetoric of 'governance' pervades both.

social policy is to miss the fact that this new policy strategy seeks to entrench a form of 'market citizenship' that differs from that reflected in the political grammar of post war social democracy."<sup>9</sup> Confirming this rationality in the European context, third-way advocate Tony Blair stated in 2005 that, "the purpose of our social model should be to enhance our ability to compete, to help our people *cope with* globalisation, to let them embrace its opportunities and avoid its dangers. Of course we need a social Europe. But it must be a social Europe that works."<sup>10</sup>

The Lisbon strategy and the ostensibly 'open' method for achieving this, certainly bears more than a trace of a Blairite third-way. It conflates a competitiveness agenda and austerity principle with a conception of social justice focused on equality of opportunity and thereby reduces employment and social policy to a supply-side emphasis on such initiatives as vocational training.<sup>11</sup> These initiatives, in turn, enable the attribution of individual responsibility (and culpability) for the management of the market uncertainties wrought by globalisation. 'Security' in the 'welfare' domain is thus no longer understood in terms of the collective mitigation of risk or uncertainty facing the individual, but in terms of *equipping* the individual with the opportunities which will enable them, in Blair's words, '*to cope with*' risk or uncertainty through improving their

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9 Kanishka Jayasuriya, "Economic Constitutionalism, Liberalism and the New Welfare Governance," *Asia Research Centre, Murdoch University Working Paper No.121* (2005). p.2.

10 Speech to European Parliament prior to UK Presidency of EU, 23 June 2005, <http://www.number-10.gov.uk/output/Page7714.asp>. Accessed August 2010. Interestingly, this speech was the impetus for that key intellectual architect of the third way, Anthony Giddens, to write his book: Giddens, *Europe in the Global Age*. p.vii.

11 See, for example, Mark A. Pollack, "A Blairite Treaty: Neo-Liberalism and Regulated Capitalism in the Treaty of Amsterdam," in *European Integration after Amsterdam: Institutional Dynamics and Prospects*, ed. Karlheinz Neunreither and Antje Wiener (Oxford: OUP, 2000).

'employability' or 'marketability'.<sup>12</sup> Such moves are motivated by the identification of a so-called 'welfare dependency' or a 'dependency culture'<sup>13</sup> which has, so the story goes, sapped the enterprising spirit from the population.<sup>14</sup> The ostensibly 'social' policies that have been promoted via 'soft' OMC technologies within the context of the Lisbon strategy have been promoted in accordance with such a rationality. The subject of entrepreneur (discussed in Chapter 1 and below) is increasingly generalised by this neo-liberal governmentality; everyone is enjoined to become an entrepreneur.

The method itself is imbued with a competitiveness rationality which pushes even policy makers to become entrepreneurial in conceiving of policy. Indeed, the method bears more than a trace of a discourse of 'new managerialism' or 'new public management' (NPM) which emerged throughout the 1980s as a method for introducing market oriented principles into public management.<sup>15</sup> As Offe notes of the OMC, '[t]he key phrases are "best practice", "benchmarking", and "management by objective", "peer control" and "temporal standardization and disciplining"'<sup>16</sup>. As we can see, the method borrows from the lexicon of management and accountancy which is intended to provide a wieldier basis for trans-EU co-operation than a traditional legal regulation, but is nevertheless underpinned by a disciplining intent embodied in the very designation of

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12 See, for example, Wolfgang Streeck, "International Competition, Supranational Integration, National Solidarity: The Emerging Constitution of 'Social Europe'," in *Will Europe Work?: Integration, Employment and the Social Order*, ed. Martin Kohli and Mojca Novak (London: Routledge, 2001). pp.26-7.

13 Thatcher 1993 cited in O'Malley, *Risk, Uncertainty, and Government*. p.68.

14 Ibid.

15 For but one evaluation from an enormous mainstream literature, see, for instance, Christopher Hood, "A Public Management for All Seasons?," *Public Administration* 69, no. 1 (1991). Note that Hood was among the academics consulted by the FSU in the course of their governance project (see Chapter 5). For a critical account see O'Malley, *Risk, Uncertainty, and Government*. pp.63-8.

16 Claus Offe, "The European Model Of "Social" Capitalism: Can It Survive European Integration?," *Journal of Political Philosophy* 11, no. 4 (2003). p.2

'best practice'. The *soft* OMC may therefore be part and parcel of an emerging orthodoxy which extends a rationality of competitiveness, flexibility, enterprise and the market into domains beyond the economic, including into the arena of government and policy making itself; indeed, the role of policy maker is distributed among a range of potential *policy entrepreneurs* both public and private. As Walters and Haahr put it:

The emphasis has shifted away from the project of establishing certain conditions for market forces to play themselves out, through legal interventions such as harmonization and the establishment of a body of European law defining what ordoliberalism saw as a European economic constitution. With the OMC the emphasis is placed much more on generating a set of methods for acting upon government itself ... We see a move to implicate other agencies, bureaucracies, organizations and enterprises within a logic of self-improvement and self-driven but carefully regulated optimization of performance.<sup>17</sup>

We see here evidence of a competitiveness agenda 'all the way down' discussed in Chapter 2 with reference to neo-liberal government. The OMC technology is imbued with the rationality it sets out to achieve; competitiveness in governing promotes competitiveness in the social world, promotes competitiveness in the economy. Following such a rationality to its logical end, governance is envisioned in spatial terms as a vast number of functionally specific overlapping jurisdictions, each competing in terms of efficiency calculations; it is a conception which corresponds with the visions of neo-classical economists and public choice theorists for whom the federal nation-state and its 'nested' jurisdictions defy the logic of economic efficiency and competitiveness.<sup>18</sup> We see

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<sup>17</sup> Walters and Haahr, *Governing Europe: Discourse, Governmentality and European Integration*. p.120.

<sup>18</sup> Gary Marks and Liesbet Hooghe, "Optimality and Authority: A Critique of Neoclassical Theory," *Journal of Common Market Studies* 38 (2000).

that the once marginal figure of the entrepreneur becomes omnipresent within this neo-liberal rationality (see Chapter 1) and the room for resistance is apparently delimited.

### *The Entrepreneur as Uncertain Subject*

To the extent that work has been carried out on behalf of the European Commission on the concept of entrepreneurship, it has highlighted that "there is little consensus about what actually constitutes entrepreneurial activity."<sup>19</sup> It is not always clear, then, who this figure of entrepreneur is; for instance, what it precisely is about the entrepreneur that is different from the trinity of capitalist, wage labourer or property owner. It is not, moreover, clear that entrepreneurial agency is to be associated exclusively with the individual subject, although individual subjects are, as noted above, certainly encouraged to be entrepreneurial.

If we follow the logic of the Lisbon strategy – the context within which the entrepreneur is championed in policy discourse - then the key task of the individual entrepreneur is to cope with and manage the uncertainties of the market in an effective, competitive way. Typically, this means, in an *innovative* manner that generates, to use Schumpeter's term, 'entrepreneurial profit' and therefore economic growth.<sup>20</sup> As the EU Action Plan on entrepreneurship put it,

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19 David B. Audretsch, "Entrepreneurship: A Survey of the Literature," (Prepared for the European Commission, Enterprise Directorate General, 2002).

20 Joseph Alois Schumpeter and Redvers Opie, *The Theory of Economic Development; an Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle*, Harvard Economic Studies (Cambridge, Mass.: Harvard

*Entrepreneurship is a major driver of innovation, competitiveness and growth.* Due to their strong presence in key sectors such as services and knowledge-based activities, smaller enterprises and entrepreneurs today play a central role in the EU economy. A positive and robust correlation between entrepreneurship and economic performance has been found in terms of growth, firm survival, innovation, employment creation, technological change, productivity increases and exports.<sup>21</sup>

In the above conceptualisation, the entrepreneur is, in a sense, conceived as the driver of the Lisbon strategy.

The promotion of new SMEs – the embodiment of entrepreneurship - is central to recent policy, because it is thought that in a 'knowledge economy' SMEs are a site of 'knowledge spillover'; they are able to take commercial advantage of the so-called 'knowledge-based' economic activities that are understood to be the drivers of economic growth that is central to its competitiveness strategy.<sup>22</sup> Correspondingly, policy is to be geared towards increasing possibilities and creating incentives for individuals to take risks commensurate with the establishment of such firms. EU policies - pursued via the OMC and which reflect an understanding of 'best practice' in this area - include, *inter alia*: promoting the removal of barriers to entry such as high levels of regulation, taxation and bureaucracy; encouraging the privatisation of services to create opportunities; spreading

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University Press, 1934). p.128, cit. Jones and Spicer, "Outline of a Genealogy of the Value of the Entrepreneur."

21 European Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Action Plan: The European Agenda for Entrepreneurship," (Brussels: 2004), ———, "Green Paper: Entrepreneurship in Europe," (Brussels: 2003).

22 Audretsch, "Entrepreneurship: A Survey of the Literature." pp.9-10.



technological capabilities (Infosoc)<sup>23</sup>; de-stigmatising bankruptcy<sup>24</sup>; encouraging geographically organised entrepreneurial 'clusters'; and actively rewarding initiatives that promote an 'enterprise culture'.<sup>25</sup>

The EU has also focused specifically on the supply side; on investment in and promotion of active, flexible – above all, *entrepreneurial* - 'human capital', able to 'adapt' and 'perform' in accordance with a neo-liberal competitiveness rationality.<sup>26</sup> As noted in Chapter 5, it is such supply-side policy, pursued via OMC technologies, that some have associated with attempts to revive a 'social Europe', but, as highlighted above, this is a social Europe where conceptions of security and welfare are significantly re-rendered. Specific policies include, the recent promotion of 'flexicurity', where security is redefined in terms of 'coping with uncertainty' and the accent is firmly placed on flexibility in labour markets<sup>27</sup>; 'lifelong learning' aimed at closing skills gaps and increasing 'mobility'<sup>28</sup>; and the closely related attempt to celebrate and promote 'entrepreneurial

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23 Note the Commission's i2010 strategy: European Commission, "i2010: Strategy for an Innovative and Inclusive European Information Society," (Brussels: Information Society and Media, 2008). Note, also, for example, Commissioner Viviane Reding's Ludwig Erhard lecture (note the name – see chapter 2) on 'Digital Europe'

24 Note DG Enterprise and Industry's 'A Second Chance' programme. See for example: ———, "Best Project on Restructuring, Bankruptcy and a Fresh Start," (Brussels: Enterprise Directorate-General, 2003).

25 For example, EU SME policy aims, inter alia, at reducing barriers to the establishment of companies. The Commission has also launched 'European Enterprise Awards' which reward initiatives geared towards the promotion of enterprise and entrepreneurship in the EU. See, Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Action Plan: The European Agenda for Entrepreneurship."

26 Recall the Chicago school origins of this notion (see Chapter 1)

27 European Commission, "Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security," (Brussels: Employment, Social Affairs and Equal Opportunities Directorate-General, 2007). For a detailed and insightful critique, see, Maarten Keune and Maria Jepsen, "Not Balanced and Hardly New: The European Commission's Quest for Flexicurity," *Working Paper, Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS)* (2007).

28 For example, European Commission, "Making a European Area of Lifelong Learning a Reality," (Brussels: 2001).

mindsets' through education and learning.<sup>29</sup> Such policies are championed as 'modernisation' and they are increasingly tasked with enhancing the welfare of individuals, to the detriment of a concern with the sort of 'security' offered by both a redistributive social justice and substantive worker protection. Indeed the latter policies are rendered unwieldy, unsustainable, anachronistic and incompatible with competitiveness goals and the reconceived 'security' that they promise.<sup>30</sup> This policy modernisation permits the retrenchment of worker protection and redistribution, as the burden of risk is placed increasingly on the individual as entrepreneur who is, by definition, prepared to handle such risks. Indeed, risk management is 'devolved downwards'.<sup>31</sup>

The 'Europe 2020' strategy – the recently launched successor to the Lisbon strategy – for the most part continues this agenda. It similarly emphasises the importance of promoting entrepreneurship and entrepreneurial subjects as the means to securing economic growth in the aftermath of economic recession. Indeed, it is interesting to observe that the figure of entrepreneur (in the general sense described here and in Chapter 1) remains highly valued in policy discourse in the aftermath of a financial and economic 'crisis'; indeed, this 'subject of interest' is tasked with carrying us out of 'crisis'. A 'crisis' that some would say has, at root, been caused by the excesses of self interest and

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29 For example, ———, "Implementing the Community Lisbon Programme: Fostering Entrepreneurial Mindsets through Education and Learning," (Brussels: 2006).

30 Note that the European Commission's definition of 'flexicurity' underplays the degree to which a 'security' component includes an important redistributive element in those states – notably Denmark and Holland – from which the concept emerged. See, Keune and Jepsen, "Not Balanced and Hardly New: The European Commission's Quest for Flexicurity."

31 O'Malley, *Risk, Uncertainty, and Government*. p.73.

risk-taking. In this sense, reforms have, to a large extent, not targeted the structures of market cosmopolitan government, so much as tried to deepen them further. But, we might still wonder, who or what, in concrete terms is this figure of entrepreneur?

It seems that there can be no hard and fast rules about exactly which abilities or skills are required in order to assume an entrepreneurial subjectivity and reap entrepreneurial profits; ultimately, *there is no certainty* as to what knowledge is required. Thus, in the context of Commission pronouncements on 'the promotion of entrepreneurial mindsets through education' there is something lacking in the attempts to establish what, concretely, these 'mindsets' should be.<sup>32</sup> While it is asserted that, "the development of an entrepreneurial attitude can be encouraged in young people, starting in school", policy documents merely offer an array of glib statements on the need to encourage, *inter alia*: creativity, problem-solving, risk-taking, networking, self-confidence, independent learning and business skills (including contacts with enterprise).<sup>33</sup> For sure, these activities might foster capabilities which deliver a sense of psychological self-worth and offer a vision of work which is 're-enchanting' in certain important respects, even as such a vision might not match-up to everyone's reality. Thus, in Giddens' polemical words, "[w]elfare is not just about the avoidance of risk. Increasingly it is about *positive lifestyle change*."<sup>34</sup> However, while the promotion of these 'entrepreneurial attributes' promises individual empowerment or *welfare*, it also produces individual responsibility. The

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32 These assertions draw, in particular from: European Commission, "Helping to Create an Entrepreneurial Culture: A Guide on Good Practices in Promoting Entrepreneurial Attitudes and Skills through Education," (Brussels: Publications - Enterprise Policy, 2004).

33 Ibid.p.6

34 Giddens, *Europe in the Global Age*. p.27.

*lifestyle changes* require that responsibilised subjects govern themselves and in so doing appreciate that dependency on the state is both undesirable and a personal failing.<sup>35</sup>

Even if successful, such change is not, however, necessarily conducive to the production of *successful* entrepreneurs; an entrepreneur worthy of the name must be a driver of competitiveness and growth, a generator of entrepreneurial profit. Of course, biopolitical endeavours focused on lifestyle may serve their purpose to the extent that they render a higher proportion of populations more likely to attempt to become entrepreneurs, but there are no guarantees that particular individuals will be *successful* in this endeavour; no guarantee, in other words, that they will become generators of growth and competitiveness. A tacit acknowledgment of this is to be found in EU efforts to destigmatise bankruptcy. If the figure of entrepreneur is to be generalised beyond those with the resources to absorb the costs of such failures – as neo-liberal government attempts – then such failure itself cannot be regarded as a stigma.<sup>36</sup> It suggests that many individuals will fail and, indeed, they should be both *prepared for* and *undaunted by* this possibility.

Despite some governmental efforts in the EU to develop a list of capabilities or knowledges associated with the entrepreneur, training to become this celebrated figure is clearly not like training to be a doctor or a lawyer. One might become proficient in information technology or return to university and become an accomplished R&D

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35 Cruikshank has discussed this idea with regard to the promotion of 'self-esteem' as a means of reducing the governmental burden on the state. Barbara Cruikshank, "Revolutions Within: Self-Government and Self-Esteem," *Economy and Society* 22, no. 3 (1993).

36 Commission, "Best Project on Restructuring, Bankruptcy and a Fresh Start."

scientist at the cutting edge of new knowledge and technology, but this does not make you a *successful* entrepreneur. In accordance with such an insight, learning is often no longer aimed at mastering a fixed object or knowledge, but increasingly reconceived as *process*, in the sense that it involves "an ongoing permanent addition of competences and skills adapted continuously to real external needs."<sup>37</sup> Learning is reconceived in terms of the *flexible* and *dynamic* entrepreneurial subjects it serves in the context of an 'information society', and that is precisely why it must be continuous, *lifelong*.<sup>38</sup>

The *successful* entrepreneur relies, then, upon a knowledge which is essentially anti-knowledge; an un-scientific knowledge which might be better described as 'information'.<sup>39</sup> The preparation for entrepreneurship is not, then, knowledge in a traditional sense, but ongoing information acquisition leading to the competitiveness and growth that is commensurate with security in the 'modern', 'globalising' world. But even information acquisition and the collection of skills and competences permitting this is no guarantee of *success*; failure to exploit such information in a manner that is commercially successful remains a stark possibility. Although he did not invoke the entrepreneur,

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37 Mark Olssen, "Understanding the Mechanisms of Neoliberal Control: Lifelong Learning, Flexibility and Knowledge Capitalism," in *Foucault and Lifelong Learning : Governing the Subject*, ed. Andreas Fejes and Kathy Nicoll (London; New York: Routledge, 2008). p.40

38 See, for instance, Bert Lambeir, "Education as Liberation: The Politics and Techniques of Lifelong Learning," *Educational Philosophy and Theory* 37, no. 3 (2005). There is certainly more than a passing resemblance here with the notion of 'learning' which is so central to the FSU conception of governance (see Chapter 5); learning as an ongoing process of deliberation and knowledge (or concrete policy decision) as always contingent. For sure, the aims of 'policy entrepreneurs' need not be dictated primarily by the exigencies of economic growth – as discussed with reference to 'social entrepreneurship' below – but, as noted above, in practice, the OMC is heavily constrained and shaped by such goals. Indeed, according to dominant neo-liberal market cosmopolitan rationalities, competitiveness as driver of growth is the very purpose of the entrepreneur – his very *raison d'être*.

39 On the relationship between science and entrepreneurship from a social theory perspective, see for example, Mark Elam and Margareta Bertilsson, "Consuming, Engaging and Confronting Science: The Emerging Dimensions of Scientific Citizenship," *European Journal of Social Theory* 6, no. 2 (2003).

Hayek seems to refer precisely to this in an article written in 1945, when he describes the importance of a, "knowledge of the particular circumstances of time and place [...] of the fleeting moment not known to others".<sup>40</sup> This 'knowledge' might, to many, sound more like a case of being 'in the right place at the right time' or in the possession of specific (as opposed to 'perfect') 'information'. Indeed, the crucial aspect of this knowledge from a commercial point of view is that it is 'not known to others'. More simply, we might say that the possessor of such information is, to a large extent, just 'lucky'. Even if we bestowed upon him the virtue of 'good instinct' or, more dubiously, 'risk-taker', his success as an entrepreneur seems, at the very least, to contain a significant element of luck.<sup>41</sup> This, in turn, might lead us to wonder why the figure of entrepreneur is so valued in contemporary discourse and, indeed, economic practice vis-a-vis, say, the wage labourer. This is, after all, a wage labourer whose devaluation – or abject poverty – may in many concrete cases be the very condition for the wealth of this celebrated figure.<sup>42</sup>

Perhaps it is hardly surprising that preparing for uncertainty by becoming, in Foucault's words, *an entrepreneur of oneself*, is itself a process fraught with uncertainty. This relates to the paradox, circularity or teleological nature of market cosmopolitan government enunciated on many occasions throughout this thesis. It is a government which both *requires* and seeks to *manage* uncertainty. It is a government which acts upon a

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40 F.A. Hayek, "The Use of Knowledge in Society," *The American Economic Review* 35, no. 4 (1945).pp.521-2

41 Sometimes access to particular technologies might also be important in acquiring this privileged 'knowledge'. The controversial practice of 'high frequency trading' in the financial world reveals the extent to which banks will invest in technologies that allow them to access this commercially valuable knowledge. See, for example, the Radio 4 documentary: Michael Robinson, "File on 4 on High Frequency Trading," in *File on 4*, ed. BBC Radio 4 (2009).

42 For an excellent discussion of this question of the value of the entrepreneur in economic history/ theory see, Jones and Spicer, "Outline of a Genealogy of the Value of the Entrepreneur."

population to render it danger-conscious, prepared for uncertainty, capable of transforming uncertainty into risk, but, ultimately, is itself pervaded by an uncertainty of exactly what this population needs to know or do in order to be a *successful* or *valued* subject.<sup>43</sup> Indeed, the very sense of danger that is exemplified in the vagaries of a global market - variously reviled and loved - *requires* the maintenance of a space of uncertainty or insecurity that government itself is unable to master.<sup>44</sup> This is perhaps why, in policy terms, the bankrupt individual is both a celebrated and maligned figure; why, in short, market cosmopolitan government has variously nurtured the prudent saver and gambler-cum-entrepreneur. Such confusion is certainly manifest in contemporary responses to the so-called financial and economic 'crisis'.

As noted in Chapter 1, O'Malley among others, has highlighted the existence of "two regimes of uncertainty", which, for him, correspond with the prudent subject of classical liberalism and the risk-taking entrepreneurial subject of neo-liberalism. The neo-liberal regime presents uncertainty as "a technology of liberation"<sup>45</sup>, but such a regime is never entirely able to colonise a regime which pleads caution. A regime, in other words, which recognises the potential for the entrepreneur to fail. The uncertainties of the market are not unambiguously liberating or emancipatory precisely because the market – notwithstanding the best efforts of government (most spectacularly, finance) to re-render uncertainty as risk and thereafter 'risk-manage' – is a space of radical or *ontological* uncertainty. Thus, while a distinctly *neo*-liberal government in Europe privileges and

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43 O'Malley, *Risk, Uncertainty, and Government*.

44 See the discussions of the market and classical liberalism in chapter 1

45 O'Malley, *Risk, Uncertainty, and Government*. p.71.

tries to positively identify and promote the figure of entrepreneur via such technologies of governance as the OMC, the simultaneous uncertainty surrounding his very identity provides a space for resistance to this prevailing rationality. It offers an entry point for re-conception in terms of alternative modes of government, including the assertion of a legal cosmopolitan rationality, particularly in its deliberative form. While OMC technologies may in practice be deployed in the promotion of delimited neo-liberal rationalities, an uncertain space evidently exists in which the very deliberative impulse - which, in large part, has motivated a *governance* agenda - can assert itself once more.

### **The Possibilities and Limits of Resistance**

#### *Possibility I: The OMC and Legal Cosmopolitan Resistance*

Some important qualifications are consequently required to the picture of the OMC as inextricably linked with a neo-liberal rationality of government that has been painted in the previous sections. Although the OMC might contribute to the long term sedimentation of certain rationalities, it ought to be noted that the extent to which the kinds of best practice prescribed at EU-level within the OMC might actually 'Europeanise' domestic arenas should not be overstated.<sup>46</sup> This is reflected in the discussion of French policy in Part II of this thesis. In this sense, the 'softness' of the OMC constrains the emergence of a more substantive social EU(rope), but at the same

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46 For a strong, if over-stated, version of this argument see, Timo Idema and Daniel R. Kelemen, "New Modes of Governance, the Open Method of Co-Ordination and Other Fashionable Red Herring," *Perspectives on European Politics and Society* 7, no. 1 (2006).



time precludes from a straightforward 'transposition'. In other words, the OMC as a manifestation of the requirement of liberal government to respect a space of freedom – a space that is in one sense necessary for the constitution of responsibilised subjects (see Chapter 1) – also allows a space for resistance. In practice, then, the OMC technology operates alongside an ordoliberal economic constitution and does not eclipse a sovereign legal cosmopolitan rationality of the sort associated with Habermas.

Coupled with the possibility to resist EU-imposed fiscal constraints that we have noted with reference to French policy in Chapter 3, it seems clear that there exists a significant margin for interpretation and policy supplementation, as reflected in the continued distinctiveness of EU welfare states. Moreover, at the EU level itself, the Lisbon strategy instantiates an OMC on poverty and social exclusion which arguably relies on a more substantive normative vision than a purely efficiency or competitiveness enhancing neo-liberal rationality would require.<sup>47</sup> In the context of the 'Europe 2020' strategy, such issues are even more prominent, as reflected in the target of reducing EU poverty by 20% by 2020 and in the corresponding rhetoric of Commission President Barroso, who recently (albeit, perhaps unconvincingly) stated that "solidarity must remain the guiding principle of our action".<sup>48</sup> To be sure, the policies aimed at addressing these issues are

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47 For a balanced assessment of the social dimension of Lisbon, see, Mary Daly, "EU Social Policy after Lisbon," *Journal of Common Market Studies* 44 (2006). See also Wincott, "Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon?."

48 The emergence of this target can be attributed to, *inter alia*, an awareness on the part of Commission President Barroso of the need to shift leftwards in order to ensure his re-election earlier this year (this is reflected in a number of speeches that he made to the European Parliament). (Many thanks to representatives of the Commission – DGs Secretariat General and Social Affairs, Employment and Equal Opportunities in the course of informal discussions in Brussels in July 2010.) Among Barroso's speeches, see: Jose Manuel Barroso, "Passion and Responsibility: Strengthening Europe in a Time of Change," (15 September 2009).

sometimes conceived as entirely commensurate with a market cosmopolitan rationality; for example, profit-driven entrepreneurship, it is claimed, may offer much in the way of social inclusion.<sup>49</sup> However, historically the EU level of government has promoted a more substantive or redistributive 'European social model', even as its competences have remained limited in these areas, as discussed in Chapters 2 and 3.

As noted, the OMC has permitted the development of this agenda and not exclusively in a direction commensurate with a neo-liberal rationality. In particular, the Nice Council of 2000 launched a 'social inclusion process' – and associated 'European Social Agenda' which became part of the *acquis* – which, as well as an emphasis on the activation of population discussed above, also included a more general call 'to help the most vulnerable'. As noted, 'Europe 2020' translates this into a concrete target for poverty reduction. While the OMC cannot impose the specific manner in which states address such targets, attempts have been made at EU level to render it possible to measure the performance of member states in such areas and identify good practice through, *inter alia*, peer reviews. The indicators agreed in the context of the 'Europe 2020' poverty reduction targets include a measure of those in material deprivation and those at risk of poverty based on an income measure.<sup>50</sup> There is at the very least an implication in these various

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49 Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Action Plan: The European Agenda for Entrepreneurship." p.3.

50 These indicators are: (1) 'at risk of poverty': those who live with less than 60% of the median income in their country (2) 'material deprivation': people whose living conditions are severely constrained by a lack of resources (They experience at least 3 out of 9 deprivations: people cannot afford i) to pay their rent or utility bills, ii) keep their home adequately warm, iii) face unexpected expenses, iv) eat meat, fish, or a protein equivalent every second day, v) a week of holiday away from home once a year, vi) a car, vii) a washing machine, viii) a colour tv, or ix) a telephone. ) (3) 'people in workless households': people (aged 0-59, not students) living in a family where no one works (or very little). In practice, member states will be able to

EU-level indicators and targets around poverty and social exclusion that some redistributive policy measures ought to be considered within a broader policy mix aimed at tackling social exclusion and poverty.<sup>51</sup> This is reflected in the 'Europe 2020' strategy paper, which refers to the importance of 'adequate income support' at national level.<sup>52</sup> At the European level it is reflected in the existence of structural and cohesion funds (particularly the European Regional Development Fund and the European Social Fund).

More generally, it can be said that within the emerging agenda the potential tensions between economic man and civil society that Foucault emphasises (see Chapter 1 and below) are present, if not explicitly acknowledged. Notwithstanding their limitations or relatively lowly ranking in the EU policy hierarchy, such policies go beyond the vision of EU as a (re)-regulatory body concerned exclusively with promoting efficiency and competitiveness and reflect also the concerns of those social democratic governments that were in power throughout the EU during the late 1990s, to offer an agenda beyond a crude neo-liberalism.

It is notable that even when the Barroso Commission in 2005 sought to relegate the importance of these policies and refocus the Lisbon strategy on the promotion of growth

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focus their efforts on one or other of these indicators. (Thanks to Isabelle Maquet Engsted of the European Commission – DG Employment, Social Affairs and Equal Opportunities - for explaining the discussion around indicators).

51 European Commission, "Portfolio of Overarching Indicators and Streamlined Social Inclusion, Pensions and Health Portfolios," (Brussels: 2008). See also, Graham Room, "Policy Benchmarking in the European Union: Indicators and Ambiguities," *Policy Studies* 26 (2005). Caroline de la Porte, Philippe Pochet, and Graham Room, "Social Benchmarking, Policy Making and New Governance in the EU," *Journal of European Social Policy* 11, no. 4 (2001). For current indicators, see the DG Employment, Social Affairs and Equal Opportunities website: <http://ec.europa.eu/social/main.jsp?langId=en&catId=750>. Accessed August 2010.

52 Commission, "Communication: 'Europe 2020': A Strategy for Smart, Sustainable and Inclusive Growth." p.18.

and jobs, a coalition of socially oriented actors (incorporating anti-poverty NGOs and the European Parliament) managed to secure alterations to the Commission's proposal in the Council such that social inclusion remained on the agenda.<sup>53</sup> Such civil society activism has certainly also been an important factor in the securing of the poverty reduction target in the 'Europe 2020' strategy and in the establishment of the 2010 European Year for Combating Poverty and Social Exclusion, which helped to bring these issues to the attention of senior governmental figures in the EU.<sup>54</sup> However, given the broader market cosmopolitan agenda of the EU in general and the *political* turn to austerity in the context of recent EU policy (see above and Chapters 2 and 3), it is certainly premature to celebrate the achievements of this substantive social EU(rope) agenda, as discussed below.

### *Possibility II: The Invention of 'Social' Entrepreneur*

The question of who should be responsible for social policy provision is, of course, largely beyond the remit of the EU-level OMC in these areas. Traditionally and, indeed, contemporaneously, the state has been the major actor in such provision and the reporting of poverty and social exclusion measures at the national level suggests that there is a normative assumption that the state ought to retain overall responsibility for such provision. To the extent that redistribution remains a valued aspect of social policy, it would be difficult to conceive of how this area could be *entirely* ceded to private

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<sup>53</sup> Daly, "EU Social Policy after Lisbon."p.471.

<sup>54</sup> Thanks to Sian Jones of the European Anti-Poverty Network (EAPN) for such insights in the course of informal discussions in Brussels in July 2010. See also, <http://www.eapn.org/>. Accessed August 2010. Thanks also to Bartech Lech of the Social Platform.

organisations. That said, in recent years much social policy provision has been ceded to the private or so-called 'third sector' and within this context an interesting discourse has emerged – supported to some extent by the EU - which blurs the distinction between state and civil society and, at the same time, the language of market and legal cosmopolitan government: namely, a discourse of the 'social entrepreneur'.<sup>55</sup>

A popular, but unclear notion, one scholarly offering captures its potential breadth: "[w]e define social entrepreneurship as innovative, social value creating activity that can occur within or across the nonprofit, business, or government sectors."<sup>56</sup> A report commissioned by the European Commission's DG Industry and Enterprise has identified a similarly broad range of attributes associated with a 'social enterprise'. Such an enterprise, "fulfils social goals; has a trading income; addresses a target population in need; may operate under various legal forms; deals with voluntary social work; has a non-profit orientation or reinvests profits; [and] may receive public funding".<sup>57</sup> The term social enterprise is, then, usually deployed as a catch-all term encapsulating an array of organisations – adopting various legal forms - focused on 'social goals'. At European level an umbrella organisation, 'Social Economy Europe'<sup>58</sup>, is active in highlighting the interests of social enterprises - taken to include, co-operatives, mutuals, associations and

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55 Such a discourse is particularly pronounced in the UK, in the context of the government's 'Big Society' initiative, where the language associated with state and civil society is similarly blurred (see, <http://www.thebigsociety.co.uk/index.html>. Accessed August 2010). In the UK there is even a 'school for social entrepreneurs' (see: <http://www.sse.org.uk/>. Accessed August 2010).

56 James Austin, Howard Stevenson, and Jane Wei-Skillern, "Social and Commercial Entrepreneurship: Same, Different, or Both?," *Entrepreneurship Theory and Practice* 30, no. 1 (2006).

57 Eva Heckl et al., "Study on Practices and Policies in the Social Enterprise Sector in Europe " (Austrian Institute for SME Research and TSE Entre, Turku School of Economics, Finland - On behalf of the European Commission, DG Enterprise & Industry 2007). p.12

58 Until 2008, this organisation was called the European Standing Conference (Conférence Européenne Permanente - CEP) of Co-operatives, Mutual societies, Associations and Foundations (CEP-CMAF).

foundations - in EU fora, with links, in particular, to the Commission. As this organisation states on its website,

The social economy has a broad social foundation and conducts its activities in varied legal forms while demonstrating its competitiveness and its capacity to grow and adapt to new social and economic challenges. It is therefore a *fundamental component of organised civil society*.... The social economy makes a significant contribution to the development of a plural society that provides for greater participation, more democracy and more solidarity.

As we can see, advocates of 'social economy' have become adept at speaking in the language of a market cosmopolitan rationality, but also make clear that they act in accordance with a set of principles that we would associate principally with a legal cosmopolitan rationality, notably, *participation, democracy and solidarity*. The social enterprise is *competitive*, not in terms of its market share or profitability, but in terms of its delivery of various outcomes perceived to have social benefits. The social entrepreneur is the subject who makes possible a social enterprise and social economy. According to a European Commission factsheet:

Social entrepreneurs are focused on social problems, and they create innovative initiatives, build new social arrangements, and mobilize resources in response to those problems *rather than the exclusive pursuit of market or commercial criteria*. We could argue that Social Entrepreneurship is the deployment of *entrepreneurial resources* for pursuing social objectives in a sustainable way.<sup>59</sup>

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<sup>59</sup> Platon+ Fact Sheet, "'Social Entrepreneurship' - New Forms of Social Value Creation: Development and Social Transformation," ed. Platon+.

As discussed above, such 'entrepreneurial resources' would include the ability to innovate and take risks, although, as also highlighted, there is certainly a great deal of uncertainty regarding the potential usefulness of such resources.

The interesting point for present purposes is not, however, these definitional difficulties. It is, rather, to consider the reason for the adoption of a language of social entrepreneurship and social enterprise in place of – or supplement to – a more established set of terms such as charitable worker/organisation, NGO, co-operative, association, foundation or, simply, *civil society*. As seems to be the case for *Social Economy Europe*, a shift to this discourse may represent an attempt by those primarily working in accordance with a legal cosmopolitan rationality – and associated concept of solidarity – to curry favour with a prevailing market cosmopolitan rationality. Thus, while market cosmopolitan rationalities draw on a discourse from legal cosmopolitan rationalities – the notion of a 'social' market and so forth – it is also the case that legal cosmopolitan rationalities attempt to alter or stretch the meanings of discourses promoted by market cosmopolitan rationalities of government in a way that is conducive to their aims.

The deployment of a language associated with prevailing market cosmopolitan rationalities to describe organisations which encompass what might otherwise be called civil society, may in large part be a tactical one on the part of its advocates. Such a tactic would appear to have been successful to the extent that the issue of social entrepreneurship has an ever increasing presence on the Commission's agenda. The

Commission has, for example, as noted, commissioned a report on social enterprise<sup>60</sup> and recently conducted a public consultation on a proposed 'European Foundation Statute' which would overcome extant cross-border barriers to the activities of foundations and this has been welcomed by, among others *Social Economy Europe*.<sup>61</sup> The importance of social entrepreneurship is also mentioned in the Commission's more general 'Action Plan on Entrepreneurship'.<sup>62</sup>

One could certainly quibble with the use of the term 'entrepreneur' by a civil society with no intention of generating profits, when this is a key defining feature of the *successful entrepreneur*, as discussed above. Equally, it is important to note that the profit motive is not explicitly excluded from many definitions of social entrepreneur, including the above definition from the Commission, which excludes only the *exclusive* pursuit of commercial interest. From this point of view, it is also possible therefore to question the use of the term 'social' to characterise the endeavour of some entrepreneurs seeking to reap the benefits of the social entrepreneur label. Indeed, the term might find favour not only with those seeking to legitimate their social activities in terms of a discourse associated with a prevalent 'new managerialism', but also with commercial entities seeking to benefit from relatively generous regulations applied to such organisations.<sup>63</sup>

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60 Heckl et al., "Study on Practices and Policies in the Social Enterprise Sector in Europe ". p.12

61 European Commission, "Press Release: Commission Consults on a Possible European Foundation Statute," (Brussels: 2009). See also, Alain Coheur, "Contribution to the European Commission Public Consultation on a European Foundation Statute," ed. Social Economy Europe (Brussels: Social Economy Europe, 2009).

62 Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Action Plan: The European Agenda for Entrepreneurship."p.9.

63 As the DG Enterprise and Industry commissioned study notes: "An obvious policy measure to underline the importance of social enterprises and to improve the framework conditions for these organisations is the introduction of special legal forms for these types of enterprises or laws on social enterprises often in



On the one hand, then, the use of a market cosmopolitan language on the part of various civil society activists might lend a certain legitimacy to their activities in the eyes of a neo-liberal government – it might create certain possibilities for civil society to assert the importance of public welfare schemes by couching them in the language of innovation, efficiency and competitiveness. On the other hand, the use of such language might also act as an important constraint on the sorts of activities that government (as in the state or public sector) is able to legitimately perform and on the identities of those that perform them. This, in turn, may have consequences for the sort of welfare provision that is offered, as elaborated below.

#### *Limit I: Deliberative Governance as Civil Society Government*

As with Giddens' 'third way' discourse, there is a sense in which the Lisbon strategy and the policies emerging from it – as well as the discourse of social entrepreneurship - contain a little for everyone; they are imbued with both market and legal cosmopolitan rationalities (and a blurring of the associated language), different aspects of which will appeal to different constituencies and, indeed, emerged out of these various constituencies' preferences.<sup>64</sup> However, as in Giddens' conception, there is little genuine recognition of the potential tensions between these agendas. Neither is there an explicit recognition of the prioritisation of agendas, even as they are, in fact, prioritised in

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combination with privileged regulations concerning tax etc." Heckl et al., "Study on Practices and Policies in the Social Enterprise Sector in Europe".

<sup>64</sup> On the equivocal nature of the 'third way' see, for example, McLennan, "Travelling with Vehicular Ideas: The Case of the Third Way."

accordance with the perceived expediencies of globalisation and competitiveness discussed above.

The very focus on a discourse of 'inclusion', 'exclusion' and 'activation' in the social policy agenda coheres with a concept of equality of opportunity compatible with an ordoliberalism or 'third way' agenda, to the detriment of a focus on economic inequalities. As alluded to at the start of this chapter, the aim of social policy is primarily to 'keep everyone in the game' of competition ('coping'), rather than to limit inequalities. Indeed, as noted in Chapter 1, the very game of competition – and the very subjectivity of entrepreneur – relies upon inequalities that must in fact be sustained. Thus, for example, the neologism 'flexicurity' reflects a desire to appeal to both a legal (solidarist) and market rationality, but in its concrete conceptualisation it is clear that flexible labour markets come first and security is reconceived in terms of this flexibility.<sup>65</sup> In the case of life-long learning, learners are portrayed as autonomous and empowered subjects, but learning is inextricably linked with the aim of becoming a successful entrepreneur.

Related to this, in the case of employment or social inclusion policy more generally, there also appears to be a convenient assumption that nation-states through local policy initiatives are entirely in control of levels of exclusion or poverty and that such policies are exogenous to broader economic orientations (such as fiscal austerity and the Lisbon or 'Europe 2020' competitiveness agenda). As Room states, "if the indicators that are made available persist in treating the nation-state as being in charge of its own destiny,

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65 Keune and Jepsen, "Not Balanced and Hardly New: The European Commission's Quest for Flexicurity."

the result will be nation-states which are less well equipped to act in concert to shape their shared socio-economic environments.”<sup>66</sup> The delinking of measurements of social inclusion and poverty from questions related to the economic constitution (for instance, the SGP, and ‘market’ exigencies) conceals the manner in which a policy agenda focused on the former is, in fact, inevitably shaped by the latter. Notwithstanding the extremely important examples of resistance to market cosmopolitan rationalities and the renewed deployment of a discourse of ‘social EU(ropa)’, it is important to emphasise that neither the OMC nor a ‘deliberative-legal’ agenda more generally should be understood as representing a radical break from the prevailing market cosmopolitan rationalities either in the direction of a more social / solidaristic Europe or a more democratic Europe.

For some, these limitations in the OMC are a consequence of governance as practice failing to live up to governance as deliberative promise. Indeed, as manifest in practice, the ostensibly open method may seem to be a far cry from the open deliberative processes advocated by theorists such as Bohman or by the FSU in its proposals on governance. Cosmopolitan theorists are aware of these practical limitations of the OMC. As Bohman says, “its primary democratic deficit is insufficient transparency and openness to publics”. He goes on to argue that this,

...could be corrected by use of the strategy of minipublics and broadening the agenda-setting powers of institutions outside the Commission. Thus, directly deliberative polyarchy is properly distributed and decentered; but its democratic character in the EU needs to be deepened. This

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66 Room, “Policy Benchmarking in the European Union: Indicators and Ambiguities.” p.127.

transformation will itself take an experimental process of collective learning.<sup>67</sup>

Beck and Bohman and a number of other theoretical celebrations of the OMC thus hold on to its potential for deliberative governance even as they acknowledge its practical limitations. They seek to push the OMC in a direction that broadly accords with the FSU notion of governance such that its potential to embody the ideals of a deliberative democracy might come closer to realisation. Thus, although the OMC might, in practice, support rather than challenge a prevailing market cosmopolitan rationality, this is because it has not been extended far enough into areas designated by the economic constitution as being decided via the community method (Beck) and, related to this, because the processes that the OMC instantiates have not, in practice, been sufficiently transparent and participatory (Bohman).

Increased civil society involvement in transnational deliberative contexts is often regarded as the panacea that is transnational democracy.<sup>68</sup> In Habermas's terminology, civil society is the political representative of an autonomous 'lifeworld' (or public sphere) characterised by communicative rationality and that which legitimises the law. As he says, "legitimate law reproduces itself only in the forms of a constitutionally regulated circulation of power, which should be nourished by the communications of an *unsubverted* public sphere rooted in the core private spheres of an *undisturbed* lifeworld

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67 Bohman, "Constitution Making and Democratic Innovation: The European Union and Transnational Governance." p.333.

68 Sending and Neumann, "Governance to Governmentality: Analyzing NGOs, States, and Power."

via the networks of *civil society*."<sup>69</sup> Civil society is, in other words, a central actor in the co-originality thesis enunciated in Part II; it is that which renders a constitutional consensus legitimate because it is an autonomous space embodying the possibility of communicative action or a discourse ethic.

Elsewhere, as discussed in Chapter 3, Habermas is acutely aware of the ways in which both (welfare) state and economy (or, in his words, 'the system', characterised by a purposive rationality) has encroached upon or 'colonised' the lifeworld of communicative action that emerged in the context of eighteenth century classical liberalism, but this does not prevent him from celebrating the possibilities inherent in this domain and seeking to render it as an autonomous realm of communicative action.<sup>70</sup> As Ashenden says,

In effect, Habermas's theory operates in a similar manner to liberal accounts, constructing a sociologised version of the public/private distinction and constituting the 'private' or 'lifeworld' as a realm of freedom, autonomy and consensual action .... The lifeworld is regarded as an arena ... *capable of disclosing the ideal of an undistorted intersubjectivity*. This grounds his understanding of civil society as a privileged locus of resistance to the colonising impetus of system imperatives. In this the lifeworld, and in particular civil society, provides the *possibility of an outside of power* disclosed by the immanent features of communication.<sup>71</sup>

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69 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* p.408

70 He is concerned, for example, that private economic interest groups may be privileged to a dangerous extent. For a summary of this issue, see Curtin, "Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance."

71 Samantha Ashenden, "Questions of Criticism: Habermas and Foucault on Civil Society and Resistance," in *Foucault Contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory*, ed. Samantha Ashenden and David Owen (Thousand Oaks, Calif.; London: SAGE, 1999). pp.157-159.

But, we may wonder whether such an 'outside of power' is either possible or, perhaps more significantly, desirable. In other words, we might wonder whether civil society is worthy of such praise and consider what the effects of this might be. Even on the basis of the thin conditionality proposed by deliberative democrats a decision still has to be made about *whom* is considered capable of deliberation; who is reasonable, self-reflexive, capable of learning. As with other forms of government, participatory governance is in practice conditional upon a particular constitution; it permits certain subjectivities while excluding others. Only if such conditionality is established can a dialogic politics or a discourse ethic manifest in a consensus, even a contingent one of the sort celebrated by the FSU.<sup>72</sup>

Of course, in theory, it is argued that the fundamental normative frameworks or constitutional realities should themselves be subject to ongoing amendment, via such processes as 'feedback loops'. And yet, the very assertion that any contingent constitutional framework must permit a consensual outcome might itself be regarded as an act of power in the Foucauldian sense. Consensus is possible through exclusion, through assimilation, through *government*. While certain deliberative and cosmopolitan scholars thus alert us to the limitations of extant new governance in Europe – often in terms of its referent neo-liberal economic constitution and the limited range of actors involved in its constitutional moment – they frequently fail to acknowledge their own act of government. Even in the most radical, pluralist, difference-respecting, deliberative

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72 Habermas, *The Theory of Communicative Action* Owen Parker, "Why EU, Which EU? Habermas and the Ethics of Postnational Politics in Europe," *Constellations: An International Journal of Critical and Democratic Theory* 16, no. 3 (2009).

accounts it is possible to detect an act of power or government; an attempt to conduct conduct; to delimit the seeable and sayable; essentially to delimit freedom.

In Chapter 1, and again in this chapter, I have highlighted the ways in which liberal government requires a space of uncertainty in order to constitute self-regarding, future oriented subjectivities; in other words, the ways in which freedom and government might be co-constituted. To repeat Burchell's words, "[t]o govern individuals is to get them to act and to align their particular wills with ends imposed on them through constraining and facilitating models of possible actions. Government presupposes and requires the activity and freedom of the governed."<sup>73</sup> In many deliberative cosmopolitan accounts - including in Habermas's account (described in Chapter 3) and in the European Commission's own notion of good governance (Chapter 5) - the requisite 'activity and freedom' is supplied by civil society, whereas 'the end imposed' is a consensus which permits action. In practice, then, civil society becomes a subject of governance at a price: it is simultaneously rendered an object of government. Its freedom is not absolute, but constrained by government (by, in Habermas's terminology, 'the system' characterised by a purposive rationality); it is 'responsibilised' and rule-bound both by legal frameworks and by those who it represents. It is, in short, engaged in a 'contractual implication' with the state, the public institution, or, more broadly, with a dominant rationality or regime of government.<sup>74</sup>

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73 Burchell, "Peculiar Interests: Civil Society and Governing 'the System of Natural Liberty'." p.119.

74 ———, "Liberal Government and Techniques of the Self.", Sending and Neumann, "Governance to Governmentality: Analyzing NGOs, States, and Power."

## *Limit II: The Difficulties of Refusal*

Sometimes this 'contractual implication' is rendered explicit. As the commission states in the 2001 White Paper: "the Commission will [e]stablish partnership arrangements going beyond the minimum standards in selected areas committing the Commission to additional consultation *in return for* more guarantees of the openness and representativity of the organisations consulted."<sup>75</sup> Or, more succinctly, "with better involvement comes greater responsibility."<sup>76</sup> This responsabilisation is apparent in the discussion of Commission consultation procedures and its transparency initiative in Chapter 5. Of course, openness and representativity might seem like desirable or *reasonable* conditions for involvement in decision making, but the issue of establishing what in concrete terms constitutes these criteria is an act of considerable political power that, as noted, the Commission guards jealously. Many who do not engage in the contractual implication – who do not to the Commission's satisfaction demonstrate their 'representativity' – are left unrepresented. The point is that despite the Commission's best efforts at inclusivity a necessary choice always has to be made about who is included and which voices are accorded recognition. This is as true for the definition of policy in the context of the Community method as it is for the definition of 'best practice' or appropriate 'benchmarks' in the context of the OMC.

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<sup>75</sup> Commission, "European Governance: A White Paper."

<sup>76</sup> Ibid. p.15.



There is, we see here, a connection and mutual dependence between political authority – a power/knowledge nexus - and civil society; they legitimate one another and are never entirely autonomous. The fact that numerous Brussels based umbrella NGOs or civil society lobbying groups are Commission funded and many (though, admittedly not all) of those working for such organisations actively aspire to go on to one day work for the Commission or other EU institutions, offers stark evidence of the blurry boundaries between government and civil society in the context of Brussels-based European level government.<sup>77</sup> Indeed, Saurugger notes that there has been a ‘professionalization’ of civil society in response to the Commission’s embrace which means, *inter alia*, that civil society activists are increasingly drawn from professional legal and communications backgrounds (often graduates of famous European management schools) rather than specialists in their organisation’s field with grassroots experience.<sup>78</sup> As Kohler-Koch et al. put it, “[t]he dominant picture [within European civil society] is that of ‘EU-level lobbying professionals’.”<sup>79</sup> There may, then, be a disjuncture between grassroots civil society and their representatives at the European level, where “civil society organisations

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77 Kohler-Koch expresses the same idea in more sober language: “If those who have responsibility at the EU level are coming from the Brussels circuit and expect to be part of it also in the future, their focus will be different from those who came in as officials or volunteers from grassroots associations with the perspective to return.” Beate Kohler-Koch, Christine Quittkat, and Vanessa Buth, “Civil Society Organisations under the Impact of the European Commission’s Consultation Regime,” in *CONNEX Final Conference* ed. Beate Kohler-Koch (Mannheim: 8 March 2008). p.10. The empirical element of this research analyses the EU Civil Society Contact Group, an umbrella organisation encompassing a range of smaller groupings of ‘rights and values based NGOs’. <http://www.act4europe.org/code/en/about.asp?Page=2&menuPage=2>

78 Sabine Saurugger, “Analyzing Civil Society Organizations’ Changing Structures in the EU: Lessons from the Social Movement and Party Politics Literature ” in *Conference: Bringing Civil Society In: The European Union and the Rise of Representative Democracy* (European University Institute, Florence: 13-14 March 2009).p3

79 Kohler-Koch, Quittkat, and Buth, “Civil Society Organisations under the Impact of the European Commission’s Consultation Regime.” p.21.

may be trapped by the need to adapt to the 'logic of influence' prevailing in Brussels".<sup>80</sup>

Indeed,

... organising effective participation may come at the price of turning civil society organisations into a lobby group like any other, i.e. concentrating on particular interests and being – at best – a transmission-belt, instead of providing a space for reasoning and deliberation. The dangers are twofold: Efficiency calls for *elitism* and effectiveness suggests *specificity*. For the sake of efficiency positions will be defined in the inner circles of Brussels.<sup>81</sup>

To return to the more general discussion, these assertions confirm the ways in which consensus becomes possible only via the exertion of political power – the conduct of conduct acts both upon and within civil society. Viewed in this way consensus begins to look more like compromise, rather than the discovery of a contingent truth. Civil society is not, in practice, the 'outside of power' that Habermas seems to think that it could and should become. Moreover, it seems unlikely that it could be so, precisely because public and private are not discrete spheres operating according to their own rationalities in the way that either Habermas or a range of liberal positions claim.

Recognising such issues, some deliberative scholars have argued for an active refusal of this contractual implication on the part of civil society. Dryzek, for example, in his conceptualisation of 'discursive' democracy, has argued that civil society groups should refuse the invitation to sit at the same table as state or government authorities, instead occupying an independent public sphere of free thought and discussion. They are to

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<sup>80</sup> Kohler Koch et al. offer some empirical evidence of this: Ibid.

<sup>81</sup> Ibid.p.6

constitute, in other words, a discursive realm independent of, but indirectly impacting upon, (the) government.<sup>82</sup> In typically deliberative style, Dryzek goes on to advocate an equal relationship between a plurality of realms, such that a dominant regime or expert knowledge is not privileged. However, as already noted, power relations are not solely located in the state or formalised public institutions and they are not always a consequence of civil society's attempt to act directly upon formal policy.

Consider Foucault's broad definition of discourse, discussed in Introduction, as a network of practices of saying and seeing. It could be argued that even radical deliberative scholars such as Dryzek are not sufficiently sensitive to the ways in which expert knowledges not only exert themselves in the context of various formalised governmental decision making fora, but also render problems or 'things' visible in the first place. Alternative or non-expert discourses are thus framed to some degree or other in terms of dominant expert discourses (or visualisations/ imaginings) and enjoined to operate within their logic or 'reason'.<sup>83</sup> With reference to EU government, this has been highlighted above in the case of the promotion of the 'social' entrepreneur, but it is apparent in a host of civil society campaigns that must reconcile themselves with 'modern' understandings of social policy or institutionalised notions of participation and dialogue.<sup>84</sup> Such framing is not exclusively a consequence of civil society efforts to speak

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82 John S. Dryzek, *Deliberative Global Politics : Discourse and Democracy in a Divided World* (Cambridge: Polity Press, 2006). For a concise overview of the debate, see Smith and Brassett, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives."

83 Ryan Walter, "Foucault and Radical Deliberative Democracy," *Australian Journal of Political Science* 43, no. 3 (2008).

84 Indeed, the very valorisation of civil society is arguably rooted in a corresponding devalorisation of 'the state' or 'government' and an associated promotion of 'governance' (see Chapter 5).

to government; in order to speak to and have an impact upon public opinion *at all*, civil society has to respect certain dominant or expert conceptions of both the *seeable* and *sayable*.

Walter successfully elucidates the limitations or boundaries that are implicit in Dryzek's radical deliberation (and, by extension, that of other less radical deliberative or procedural approaches):

Because Dryzek conceived of discourses as linguistic frames of reference, what is passed over is that the ability to make objects seeable, or to institutionalise their existence, is the preserve of a select few expert discourses only. As a result, expert discourses must appear in Dryzek's program as coercive, since non-expert discourses can only mount challenges along the sayable, not the seeable. In addition, and as indicated, the seeable appears to sharply delimit the range of what is sayable, *as seen in the idea that what Dryzek construes as competing discourses appear from a Foucaultian perspective as only variations on a theme.*<sup>85</sup>

There is, then, an inability or unwillingness, even from this more *radical* strain of deliberative governmentality, to fully grasp the potential limitations of resistance *in* civil society or, indeed, to recognise that this very governmentality is itself a delimiting factor *for* civil society, to the extent that it rests on a number of implicit assumptions about both the sayable and the seeable.

This is apparent in the case of the 'social entrepreneurship' discourse. While such a discourse attempts to assume the language of entrepreneur for social purpose, its very

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85 Walter, "Foucault and Radical Deliberative Democracy." pp.542-3.

deployment is symptomatic of the aforementioned 'contractual implication'. While the use of this term may challenge prevailing market cosmopolitan conceptions, at the same time, it, perhaps unwittingly, renders these actors complicit in the privatisation of a social function that, in many instances, was previously offered by the state. Not only is the state relatively devalued as the provider of social security, the competitive imperative, when it is genuinely applied, can create incentives for 'social entrepreneurs' to exclude or sanction the most disadvantaged.<sup>86</sup> At the same time, as the state is delegitimised, even its capacity to provide the financial means for social 'enterprise' – essentially its capacity to tax and spend – is undermined and thus its financing too is privatised. Individual charity and philanthropy – reinvented as corporate social responsibility (CSR) – become the order of the day. The neo-Victorian implications hardly need elaboration.

There is, in short, a fundamental tension between the enterprise and welfare function that civil society actors themselves feel compelled to paper-over with the invocation of the potentiality of 'social entrepreneur'. In short, the 'social entrepreneur' may often – to paraphrase Walter – be little more than a *variation on a theme*. Indeed, the discourse is a variation on similar *à la mode* themes such as 'ethical consumerism', 'CSR', 'corporate social entrepreneurship'<sup>87</sup> and (most perplexingly of all) 'big society', which suffer from problems of the same order. While the quotidian work that is done under such banners ought not to be cynically rejected – and the efforts of those engaged in such work ought

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86 Beth Cook, Chris Dodds, and William Mitchell, "Social Entrepreneurship – False Premises and Dangerous Forebodings," *Centre of Full Employment and Equity, The University of Newcastle (Australia), Working Paper* 01-13 (2002).

87 James Austin and Ezequiel Reficco, "Corporate Social Entrepreneurship," *Harvard Business School, Working Paper* 09-101 (2009).

not be disparaged - at the same time the 'ethical' or 'social' labels should certainly not lull us into a state of complacency. A 'subject of right' – a subject *entitled* to social and economic rights by virtue of their membership (citizenship) – is a diminished, even vanishing, figure in this context.

More generally, the very rationality of transnational deliberative democracy – this non-statist or pluralist legal cosmopolitan governmentality - emerges out of a discursive framing of a prevailing social reality that shares much with a market cosmopolitan conception. As noted in Chapter 5, such a rationality makes repeated references to the inexorable realities of globalisation and an associated complexity, which has been both constituted by and called forth a discourse and practice of 'governance'. Similarly, as highlighted in Part I, the description and promotion of globalisation - or, prior to this, *interdependence* - has been a key story in the justification and constitution of market forms of government. Indeed, "the shift towards governance was accompanied and even intensified by an ideological shift from politics towards the market... epitomized by the Reagan and Thatcher administrations."<sup>88</sup> This ideological shift towards the unbounded market is then, in prevailing economic discourses, that which constitutes globalisation or a sense of the global. Market government is not simply *response* to globalisation it is *condition of possibility* of globalisation; it is that which drives the technologies which shrink social space and time. It is also, as outlined in Part I, that which, to a large degree,

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88 Kohler-Koch and Rittberger, "Review Article: The 'Governance Turn' in EU Studies\*," p.31

constitutes EU(rope) and thereafter, the *European economy*.<sup>89</sup> This sense of the global, in turn, justifies the extension of the market deeper into the social world.

While most deliberative cosmopolitans seek, via civil society, to instil a legal cosmopolitan rationality of solidarity and consensus into this story – promoting governance as that which nurtures greater and more plural inclusion – they accept and even celebrate the basic premise of this story in which market cosmopolitan rationalities play a central constitutive role. Globalisation and, more importantly for this thesis, Europeanisation, are conceived as inexorable realities, with certain immanent irenic possibilities and - notwithstanding the recognised dangers associated with a marketisation of lifeworld - top-down bureaucratic forms of government are not the solution; indeed, they are a constraint on these pacifistic possibilities. Acceptance of these stories depends, then, on a certain deference to *the global*, *the European* and to the economistic or market cosmopolitan rationalities which, in practice, played a major role in the constitution of such spatial conceptions – made them ‘seeable’ - and this is a deference which anyone subject to a discussion of *global* or *European* governance would, by definition, have to share.

In other words, how, for all its talk of ‘new’ or ‘deliberative’ governance, can a governing actor such as the EU – which is founded on market cosmopolitan principles - establish procedures of multi-scalar governance which both respect the truth of this story, but are

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<sup>89</sup> See, for example, Ben Rosamond, "Imagining the European Economy: 'Competitiveness' and the Social Construction of 'Europe' as an Economic Space," *New Political Economy* 7, no. 2 (2002).

also truly participatory to the extent that they include parties that do not entirely accept this story? Such a question applies not only to the practicalities of EU participatory governance, but to the politics of deliberative governance itself, which, in the very assumption of the possibility of consensus or equality – rooted in a conception of reasonableness or rationality which is itself framed by dominant conceptions of the ‘seeable’ and ‘sayable’ - undermines the inclusivity for which it professes to stand. This is a politics which, perhaps contrary to its advocates’ intent, can tend to the *status quo* in Europe and elsewhere. This is perhaps also the explanation for Habermas’s own reluctance to follow through on the deliberative implications of his discourse ethic in the context of his own politics on/for Europe.

### **‘Subjects of interest’ and ‘Subjects of right’: Towards an Ethical Ambiguity?**

The connection between market and deliberative governmentality was made more explicit in the past. To recap from Chapter 1, in classical liberalism, civil society is conceived as a domain in which subjects are free from government interference as long as they adopt *particular* market rationalities. If they do not, then they are no longer considered members of ‘civil’ society. As alluded to above, Habermas has, similarly, in his exploration of the public sphere, discussed the way in which *civil* society and a *public* sphere were co-constituted with bourgeois conceptions of freedom and government. However, he emphasises the ethical possibilities of this sphere as a space for/ of resistance; as Calhoun says, summarising his position: “[c]apitalist market economies formed the basis of civil society but it included a good deal more than that. It included



institutions of sociability and discourse only loosely related to the economy."<sup>90</sup> In other words a substantive republican identity, or constitutional patriotism – or, more generally, a communicative rationality - is immanent in this sphere.

This was something that classical liberals such as Adam Smith also recognised. On the one hand Smith is reputed for his insight that particular interests and the general may converge; it is such an interpretation which means that for many he is considered as the father of an economic 'science'. Thus, Smith – perhaps most famously - pronounced that, "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."<sup>91</sup> In this statement he is often understood as confirming the ontological primacy of the 'subject of interest' in support of the liberal government grounded in the 'market test' (see Chapter 1) that he advocated.

On the other hand, there is also in Smith a suggestion that the self interest of the butcher or brewer is desirable in the market place only where there exists some conception of a limit on these actors' interest. In his *The Theory of Moral Sentiments* he stated that,

How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. Of this kind is pity or compassion, the emotion which we feel for the misery of others, when we either see it, or are made to conceive it in a very lively manner.<sup>92</sup>

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90 Calhoun, *Habermas and the Public Sphere*. pp.7-8

91 Smith, "An Inquiry into the Nature and Causes of the Wealth of Nations." Cited in Force, *Self-Interest before Adam Smith : A Genealogy of Economic Science*.p.8

92 Cited in Force, *Self-Interest before Adam Smith : A Genealogy of Economic Science*. p.14.

The limit on self interest may manifest in law, but it originates in the moral sentiments – the compassion or pity for ‘other’ - present in a civil society. As Force says, “Smith, like Rousseau, believes that citizens must have a clear notion of the public interest in order to obey the law”; indeed, “Smith has strongly ‘republican’ leanings.”<sup>93</sup> There is, then, perhaps an ambivalence or equivocation in Smith which is testament to the complexity of human behaviour and psychology; as Force puts it, “[s]ometimes there is harmony between the interests of one group and the general welfare of society. Sometimes there isn’t.”<sup>94</sup> There are strong affinities here with Foucault’s assertion (see Chapter 1) that, “the bond of economic interest occupies an *ambiguous position* in relation to these bonds of disinterested interests [in civil society] which take the form of local units and different levels.”<sup>95</sup>

Economic or particular interests pit people and groups against each other in economic *competition* which may make for social disharmony, but also *bring people together* in the market, which is a social sphere that is co-constitutive of ‘disinterested interest’ or civil society, as exemplified, for example, in the honouring of contract. On the one hand, the freedom that is pre-requisite for liberal government, for the market, is, as discussed above, always discursively delimited – civil society is never ‘outside power’, it is born out of and enjoined to the operation of the market. On the other hand, this freedom is also a space rich in the possibility of reinterpretation and resistance - as Habermas highlights in

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93 Ibid. p.228

94 Ibid. p.231 For a similar interpretation in the context of the discipline of International Political Economy, see Watson, *Foundations of International Political Economy*. pp.100-120.

95 Foucault, *The Birth of Biopolitics : Lectures at the College De France, 1978-79*. pp.302-3 See also discussion of this in chapter 1.

his discussion of public sphere, eighteenth century civil society is about much more than market propriety - precisely because that is what any freedom worth the name facilitates.

From this point of view, the danger of a prevalent *neo*-liberal market cosmopolitan rationality - manifest in European level government via Lisbon and the OMC in its American or Chicago school variety - is that it undermines even the *classical* liberal market that was, *sometimes*, co-constitutive of the virtue or civility of a 'civil' society. Paradoxically, for a market to function as classical liberals such as Smith intended, it must not only be a site free of government, but it must also be constrained, its logic delimited; it requires a constitution or government at various levels, right down to the government of the self; the nurturing of virtue, sympathy or public reason (see Chapter 1 for a fuller discussion). In contrast, a neo-liberal rationality extends the 'subject of interest' beyond the economic domain; generalises it. As Gary Becker of the 'Chicago school' asserts,

...the economic approach is a comprehensive one that is applicable to all human behaviour, be it behaviour involving money prices or imputed shadow prices, repeated or infrequent decisions, large or minor decisions, emotional or mechanical ends, rich or poor persons, men or women, adults or children, brilliant or stupid persons, patients or therapists, businessmen or politicians, teachers or students.<sup>96</sup>

But, in extending a market or capital logic – a logic of competition, which can so easily become a social Darwinian logic of being the best or strongest – 'all the way down' to the very notion of what it is to be human, there is no longer any logical reason why those

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<sup>96</sup> Cited in Force, *Self-Interest before Adam Smith : A Genealogy of Economic Science*. p.8

who *can* – those with the *pouvoir*, the power - don't simply *take*. This potential problem has, of course, been acknowledged in certain neo-liberal accounts. For instance, as ordoliberal Wilhelm Röpke noted of their programme, it "consists of measures and institutions which impart to competition the framework, rules, and machinery of impartial supervision which a competitive system needs as much as any game or match *if it is not to degenerate into a vulgar brawl*."<sup>97</sup>

In contrast, an extreme neo-liberal logic fails to recognise this; it fails to recognise that if a competitive rationality is not offset by a conception of *disinterested interests* – a conception of *being for the other*, which is manifest in the very contractual or constitutional impulse of a legal cosmopolitan rationality – such a logic may ultimately be little more than one of chaos, of violence, war and plunder. It fails to recognise that its ideal-type subjectivity – Foucault's *entrepreneur of oneself* – has, in extreme form, a 'criminal' disregard for the public interest or even certain *sociopathic* tendencies. As Žižek has said, "...a sociopath truly practices the notion of morality developed by utilitarianism".<sup>98</sup> This is a utilitarianism that is exhaustively applied in a neo-classical economic science and rendered as normative good by Chicago school neo-liberals.

Certainly this account of the logic of neo-liberalism does not equate with any contemporary reality - nor the image of entrepreneur-as-sociopath with (m)any actual

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<sup>97</sup> Cited in Allen, "Ordo-Liberalism Trumps Keynesianism: Economic Policy in the Federal Republic of Germany ". p.205

<sup>98</sup> Slavoj Žižek, *How to Read Lacan* (London: Granta, 2006). p.14.

entrepreneurs.<sup>99</sup> However, as neo-liberal ideas prevail in the EU and elsewhere it is an account that we ought to take seriously. Within liberal government market cosmopolitan and legal cosmopolitan rationalities have, historically, staved off the worst extremes – the violent totalities - of the other with their different conceptions of freedom, government and identity. This is reflected, *if not always acknowledged*, in the apparent paradoxes in the work of more astute and reflexive political and moral philosophers, such as Adam Smith, Immanuel Kant and, contemporaneously, Jürgen Habermas. In other words, while they are distinct subjectivities with their own antecedents in liberal thought, we can say that the ‘subject of right’ and the ‘subject of interest’ counterpose the worst extremes of the other in theory and practice. As emphasised throughout the thesis, a market and legal cosmopolitanism exist in an ambiguous relationship, but this ambiguity may, from this perspective, not be something to be overcome, but something to be welcomed and constantly negotiated.

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99 Although it is notable that in the 1980s Winslow et al. conducted research which concluded that many entrepreneurs were mildly sociopathic in terms of their behaviour. See: Erik K. Winslow and George T. Solomon, "Entrepreneurs Are More Than Non-Conformists They Are Mildly Sociopathic," *Journal of Creative Behavior* 21, no. 3 (1987). The documentary, *The Corporation* makes a very similar point in relation to the personality of the corporation, comparing it to that of a psychopath; the resemblance between ideal-type and reality may, indeed, be closer in the case of the institutionally bound corporation than the individual entrepreneur. (See the book on which it is based: Joel Bakan, *The Corporation : The Pathological Pursuit of Profit and Power* (New York: Free Press, 2005). Similarly, Lockwood et al. have explored the link between criminality – particularly organised crime - and entrepreneurship and the way in which drug dealers and other such criminals self-identify as entrepreneurs. In their total disregard for ‘public good’ and one-dimensional focus on self-interest, such entrepreneurs may come closer to the ideal-type than it is comfortable to consider. (See: Frank S. Lockwood et al., "An Examination of the Power of the Dark Side of Entrepreneurship," (2006), <http://www.thedrscarland.com/CEI/Carland%20Paper%20for%20ASBE.doc>.) For instance, in acclaimed crime series *The Wire*, it is interesting to note that certain of the major gang leaders are portrayed as entrepreneurs. For instance, Russell (aka ‘Stringer’) Bell, is attending an economics course and an investigating detective discovers Adam Smith’s *The Wealth of Nations* on his bookshelf (as noted above, this may be an unfair reference to Smith).

Thus, the spatial extension of the market has had irenic outcomes in general and in Europe in particular, but, as soon as the subject within that market operates singularly in accordance with a market logic, then a liberal government can lead to the very social strife that the freeing of the market was, according to early German neo-liberals, intended to overcome. This may actually be the 'war of all against all' that Hobbes and a host of juridical accounts thereafter – Habermas's work on EU(rope) included - sought to tame (see Chapter 4) through the invocation of sovereignty or a legal cosmopolitan rationality. Contemporaneously, it may be the spectre of such a war that prompts discourses of patriotism in both their constitutional and economic varieties (discussed in Part II), although this, ironically, may lead us to war of a quite different kind; a war of nations with which Europe is eminently familiar and *to* which the project of European market integration was, for many, a direct response.

## **Conclusion**

This and the previous chapter have turned to a legal cosmopolitan ethic concerned with legitimating the *inputs* of European level government via the celebration and promotion of the notion of *governance*. The FSU reports on governance, which - rooted in a vision of a globalising, complex social world where knowledge is contingent – argue for a procedural or deliberative form of governance in order to overcome the dominating aspects (in Bohman's sense) of forms of government associated with the ontological totalities of the 'subject of right' and 'subject of interest'. At first glance a 'deliberative-legal' rationality – and the concomitant view of knowledge as contingent - may appear to

be consistent with a Foucauldian approach which seeks to problematise all forms of knowledge. It might be regarded as the possible prescriptive counterpart to such problematisation, to the extent that it takes contingency seriously. It promotes a reflexivity or agonism which many have thought embodied a Foucauldian ethics.<sup>100</sup> Ethically, there is certainly much to be said for a governing rationality which is not in thrall to expert opinion derived exclusively from the substantive images of a 'subject of right' and/or 'subject of interest'. Moreover, the vision of democracy associated with such a rationality speaks to a differentiated and plural spatial reality which is perhaps conducive to a respect for radical difference. Bohman's notion of 'demoi' (demos in the plural) encapsulates this ideal, signifying a transformation of the ideas of citizenship and membership.<sup>101</sup> In many ways, such a spatiality has strong affinities with Foucault's own concept of 'heterotopias' as places in which 'the other' might flourish.<sup>102</sup>

From the Foucauldian perspective adopted in this thesis, we might equally ask, though, *is there something substantive in this 'third way'?* What *is* a world of 'heterotopias' or a world of multi-perspectival 'demoi' in practice? What are the rules governing such a world, if any? The answer from a deliberative perspective is, of course, proper deliberative procedures. But in concrete terms, what exactly do we mean by the *quality* of a deliberative process? For the FSU this means the extent to which procedures enable participants to understand contingency, the views of others and, indeed, the importance

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100 Jon Simons, *Foucault and the Political* (Routledge, 1995).

101 Bohman, *Democracy across Borders : From Demos to Demoi*. p. vii

102 Michel Foucault, "Of Other Spaces, Heterotopias," (1967), <http://foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html>. Accessed August 2010. For a critique, see Harvey, "Cosmopolitanism and the Banality of Geographical Evils."

of this multi-perspectivity and therefore, the importance of learning. This *quality* has been described variously by deliberative scholars (and, indeed, other liberal theorists) as reflexivity, public reason or public justification.<sup>103</sup> Public reason or justification is postulated as the universal category in a plural, uncertain world, which makes deliberative consensus - and ultimately government - possible.

It has been argued, however, that this deliberative governmentality, which is necessarily geared towards consensus, is itself dependent on a conditionality which its advocates ignore or downplay. Indeed, the notion of 'public reason' or 'rationality' is that which makes possible a Habermasian consensus. In the realities of contemporary (neo)-liberal government, such reason is closely connected to the acceptance of market cosmopolitan rationalities, to the extent that such rationalities are co-constitutive of the social processes – globalisation and Europeanisation – that are the very condition of possibility of a deliberative governmentality. It should be no great surprise then, when, in practice a governmentality that in theory is ostensibly pluralist is put to the service of a neo-liberal market government which seeks to generalise the figure of entrepreneur. The point is that the principal agent of a 'deliberative-legal' government – civil society – is inevitably enjoined to accept and operate within the very social conditions – the notions of the 'seeable' and 'sayable' - which the market has precipitated and sustains. In other words, there is, contra Habermas, no 'outside of power'. This part of the thesis has, then, offered an embedded analysis of a 'deliberative-legal' rationality that highlights both its

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103 Smith and Brassett, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives."



conditions of possibility and subjectifying effects. It is 'embedded' via its analysis of contemporary EU discourses of 'governance', which has illuminated the theoretical limitations of a 'deliberative-legal' cosmopolitan government. This is an important intervention in the context of a contemporary cosmopolitan theory and practice of post-national government that often treats deliberative governance and civil society participation as ethical panacea.

That said, this part of the thesis has also tried to demonstrate the possibility for resistance to the prevalent market cosmopolitan rationality. Such resistance is made possible by the very uncertainty which underpins liberal government (see Chapter 1); it is an uncertainty which is essential to the promotion of responsibilised liberal subjects, but also constitutive of a space in which those subjects can resist any particular subjectification. It allows liberal cosmopolitan government to constantly turn on itself and question its own precepts. In neo-liberal market cosmopolitan government, this uncertainty finds its manifestation in what has been called the *uncertain figure of entrepreneur*; as intimated, this is a figure who, in practice - if he is not to be dangerous *sociopath* - is, at least to some extent, a *social* entrepreneur. This is an uncertainty, in other words, which permits the assertion of an alternative rationality of government, a legal cosmopolitan rationality of the sort discussed in depth in Part II. Such a rationality has a very different understanding of uncertainty itself, which is no longer deployed as that which simply responsibilises individuals. Rather it is mitigated by a *collective* responsibility even as the constitution and identification of such a collectivity is itself a process that is fraught with the potential for violence to the extent that it calls forth a sovereign decision.

It may be that such a decision and the violence it entails is unavoidable. Certainly there is much to be said for the inclusiveness of a 'deliberative-legal' rationality, but such inclusiveness cannot efface the imperative of political decision. Indeed, the very belief that it can, might, in practice, lead us to the confirmation of status-quo. To the extent that a 'deliberative-legal' rationality is cosmopolitan (post-national or global), this status quo, is, as has been argued, the market cosmopolitan rationality that constituted the very reality of such spaces; a market cosmopolitan rationality that is both condition of possibility and telos of EU(rope). The notion that political choice can always be the outcome of consensus or an undistorted intersubjectivity is therefore itself ethically problematic to the extent that it permits a complacency vis-à-vis this status quo.

The major contribution of this thesis has been to highlight the persistence of the ambiguity in the relationship between a 'subject of interest' and 'subject of right' that lies at the heart of the theory and practice of cosmopolitan government in Europe. This is an ambiguity which extant theory/practice seeks to deal with either through claiming an essential incompatibility/contradiction or through claiming that a commensurability is possible. As I have sought to demonstrate, in both cases, a will to knowledge actually leads to the privileging of a unified subject: an ideal citizen or entrepreneur. In short, a unified European subject is the object of European government and that which makes it possible. While the exigencies of political decision may – contra the Habermasian idealism of a 'deliberative-legal' rationality – require such a contingent privileging of subjectivity, more generally, this ambiguity ought not be expunged. Indeed, it might be regarded as an important ethical resource in/for EU(rope) as discussed in greater detail in Conclusion.

## CONCLUSION

I would define the poetic effect as the capacity that a text displays for continuing to generate different readings, without ever being completely consumed.

*Umberto Eco*<sup>1</sup>

### The Ethics of Uncertain EU(ropean) Subjects

Foucault and certain secondary literatures deploying his concept of 'governmentality' have been critiqued for suggesting that a governmental rationality – be it a market or legal governmentality – is that which essentially constitutes freedom as an idea and practice in liberal society.<sup>2</sup> There is some truth in the charge. Such scholarship is certainly interested in understanding the manner in which the concept of freedom is deployed as a tool of government and given substantive content. As explored throughout the thesis with reference to cosmopolitan government, freedom is given substantive content via both the constitution of an *unencumbered* utility maximising participant – a subject of interest – and also of an *autonomous* reasoning citizen – a 'subject of right'. Freedom is, from this perspective, always *governed*.

Habermas, among others, has identified a 'performative contradiction' at the heart of such thinking. He argues that in identifying the constituted nature of freedom, we are

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1 Umberto Eco, *The Name of the Rose* (San Diego: Harcourt Brace, 1994).

2 For a summary, see Sergei Prozorov, *Foucault, Freedom and Sovereignty* (Aldershot, Hampshire: Ashgate, 2007). pp.29-33/

given no explicit indication from such scholarship of how we might adjudicate between different rationalities. Fraser characterises such critique in a similarly dismissive vein, noting that, "*it offers no solutions of its own*, but only an extremely keen nose for sniffing out hypocrisy, cant and self-deception."<sup>3</sup> Such scholarship is interpreted, then, as making the claim that it is not possible to think outside of a particular social structure or discourse and therefore, it is not possible to know how or why to challenge such a structure. Habermas is concerned that this very idea lends itself to a political complacency and, therefore, potentially blunts any efforts to challenge the *status quo*. In short, he is concerned that the conceptualisation of freedom as a historically contingent construction of a particular social order, potentially nullifies any motive for action, any pursuit of freedom as change; indeed, it begs the question, 'why fight at all?'.<sup>4</sup>

It might be wondered whether such a critique could be levelled at this thesis. The thesis is, after all, concerned with the ethics of cosmopolitan government in Europe and yet it offers neither a blue-print for reform nor a clear idea of the ethic upon which such a reform might be built. It has, rather, as suggested above, concentrated on the manner in which ethics are manifest in particular governmental rationalities and practices. In particular, it has presented a market and legal cosmopolitan rationality as the two prevailing 'ethics', 'truths' or normative visions which, born out of a national-level liberal government, have animated the idea and practice of a cosmopolitan European level government. While highlighting the subjectivities or identities that various

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3 Nancy Fraser, "Foucault's Body-Language: A Post Humanist Political Rhetoric?," in *Michel Foucault: Critical Assessments*, Vol.3, ed. Barry Smart (London: Routledge, 1994). See also, Habermas, *The Philosophical Discourse of Modernity*

4 Habermas, *The Philosophical Discourse of Modernity* p.283.

manifestations of these rationalities seek to produce and those that they necessarily exclude, the primary task of the thesis has not been to adjudicate between these, nor to offer an alternative vision; say an ideal-type subjectivity that ought to replace them. It has not, in other words, offered a substantive vision of identity to which a European politics might orient itself. Nor, indeed, has it endorsed the very idea that identity ought to be conceived as *European*. Fraser's words, it might be thought then, are a particularly apt summary of this thesis: it identifies contradictions and paradoxes, but offers no 'solutions'.

That said, and as stated in Introduction, the decision to avoid 'solutions' or prescriptions was a conscious one, based on the view that any supposed ethical shortcomings in cosmopolitan government in Europe are not due to a paucity of proposed 'solutions' in/for European level government. As Caputo has said: "the very business of coming up with normative ideas of what the individual should be, and of developing administrative practices and professional competences to see to it that such individuals are in fact produced, is precisely the problem, not [*pace Fraser*] *the solution*."<sup>5</sup> As discussed throughout, there are a plethora of scholarly and institutional/ policy schemes professing to have *the* cosmopolitan solution to some purported crisis or ethical defect of cosmopolitan government in Europe, which is variously conceived as being too (neo)liberal, too nationalist (or not cosmopolitan enough), or too undemocratic. Thus, for instance, at the level of practice, policy makers do take decisions based on a variety of knowledge/power nexuses; on the basis of perceived certainties, if sometimes contingent

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5 Cited in Prozorov, *Foucault, Freedom and Sovereignty*. p.43 (emphasis added).

notions of 'best practice'. At the level of theory, Habermas's faith in a Kantian modernity – a faith apparently borne out of a keen desire to avoid the performative contradiction he critiques - leads him to advocate a 'discourse ethic' as foundational truth upon which a cosmopolitan government can be built. Whether such a government adopts a methodological nationalism as does Habermas in his own thought on Europe (Part II) or a methodological cosmopolitanism as do some of his followers (Part III), the identification of a truth seems, for him, to be a *sine qua non* for ethico-political action. While it is sometimes described as *intersubjective*, this truth is essentially an *ontological* truth rooted in a conception of the immanence of consensus in language, which, as we have seen, in governmental practice inevitably translates into the promotion of particular subjects.

Habermas at times concedes a need for a cultural identity (see Chapter 4) and, indeed, many pro-Europeans have repeatedly asserted the importance of establishing a meaningful European identity upon which the European project might be further developed.<sup>6</sup> Jacques Delors has, for instance, called for greater 'meaning' and 'spiritual strength' in and for EU(rope); Romano Prodi has called for the development of a 'common European soul'; and Václav Havel has called upon Europe to find its 'soul' and 'spirit'.<sup>7</sup> But the very desire for a truth or some meaning – and an associated pessimism associated with any perceived lack of such meaning - might itself be subjected to genealogical reflection. Indeed, Elbe, drawing on Nietzsche, has undertaken just such a

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6 Elbe, "'We Good Europeans...': Genealogical Reflections on the Idea of Europe." pp.263-7.

7 Cited in Catherine Guisan-Dickinson, "The European Union's Identity and the Politics of Reconciliation," in *EUSA 8th Biennial International Conference* (Nashville, Tennessee: 2003).

reflection, highlighting the contingent Platonic and Christian roots of this European desire for meaning. Turning such reasoning on its head, "[i]t is... precisely by recognising the questionable status of Europe's Christian-Platonic heritage itself that Nietzsche could insist that the pursuit of critical distance from this heritage constitutes a sign of strengthened spiritual vitality."<sup>8</sup>

It is such vitality that Nietzsche associated with the virtue of what he called 'good Europeans' and it is a 'spiritual vitality' of this sort that this thesis has sought to both draw upon – via the thought of Foucault - and promote and embody, via its critical exploration of cosmopolitan government in Europe. It has sought, in accordance with Foucault's injunction, to "transform critique conducted in the form of necessary limitation into a practical critique that takes the form of a possible transgression."<sup>9</sup> More specifically, it finds its ethical motivation in a recognition that particular individuals and identities are excluded (and *suffer*) in the face of *any* government of ethics, including various (ostensibly 'ethical') cosmopolitan forms of government. Thus, I have been primarily interested in elucidating the potentially dangerous or violent pathologies that an ontological truth or certainty can precipitate. For instance, Part I traced, in particular, the constitutive importance of a market cosmopolitan rationality that has been central to many ostensibly positive as well as explicitly normative liberal internationalist accounts in International Relations and European Studies. The embedded genealogy of cosmopolitan government offered in Part I highlighted then, the various contingent

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8 Elbe, "'We Good Europeans...': Genealogical Reflections on the Idea of Europe." p.275.

9 Foucault, "What Is Enlightenment?."p45-46

conditions of possibility and performative or subjectifying effects of a theory and practice rooted in an ontology of the 'subject of interest'. The potentially violent ethico-political implications of a Habermasian thought have also been exemplified throughout Parts II and III of the thesis. As I have highlighted, a cosmopolitan democracy or a 'statist-legal' application of his thought can lead to a reaffirmation of nationalism at the European level – the looming image of a fortress Europe (Chapter 4). A radical pluralist or 'deliberative-legal' application, while ostensibly respectful of difference, can – to the extent that it shares an ontological vision of the social world with a market cosmopolitan rationality and fails to assert a substantive constitution or social-contract – end up simply reaffirming the prevalence of a 'subject of interest' (Chapter 6). The thesis has shown, then, via an embedded analysis of cosmopolitan government in EU(rope), that these legal cosmopolitan rationalities have as their conditions of possibility particular substantive ontologies; they promote *particular* subjects and exclude certain others.

In providing an embedded critique of these various forms of cosmopolitan government – and, indirectly, a cosmopolitan political theory – the thesis shines a light on a potential *space for* resistance to the tendency of *any* particular rationality to become totality. It is rooted in a conception of freedom – what might be termed a 'real' or 'concrete'<sup>10</sup> freedom – as the 'potential for being otherwise'<sup>11</sup>; a potential to push at the edges of a discursive frame or diagram that always seeks to constrain identity through a web of power relations. Note that such a conception can be contrasted with a constituted freedom (we

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10 Foucault, cited in Prozorov, *Foucault, Freedom and Sovereignty*. p.33

11 Ibid.



might say an *illusory* freedom) of the sort highlighted above, which is tied to a particular rationality which would de-limit identity. Freedom is not, then, a stable goal to be reached (say in a particular law or human rights doctrine), or truth to be discovered. As Foucault says, "[l]iberty is a practice. The liberty of men is never assured by the institutions and laws that are intended to serve it. This is why almost all of these laws and institutions are capable of being turned around." And later: "'liberty' is what must be exercised. The guarantee of freedom is freedom."<sup>12</sup> Elsewhere, he has described such a freedom as an "*art* of not being governed quite so much."<sup>13</sup> Such a conception of freedom is, then, associated with the possibility of ongoing change and resistance; "[o]ur real freedom is found in dissolving or changing the polities that embody our nature".<sup>14</sup> Freedom is not to be found in the stable society which emerges from contest, but in the politics and struggle itself – the war by other means (see Chapter 4) – that led to change.

I do not consider this approach to be unambiguously opposed to a cosmopolitan mode of thought. As Foucault himself recognises, such thought has, since Kant, contained an important critical edge.<sup>15</sup> Indeed, the conception of freedom as the 'potential for being otherwise', shares a 'thin' cosmopolitan ontology to the extent that plurality or difference is promoted, not as a dogmatic end in itself, but as a means or *instance of* resistance. The cosmopolitan recognition of a potential for difference can be interpreted as establishing

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12 Foucault in Gordon, "Governmental Rationality: An Introduction." Gordon 1991, 47

13 Cited in Prozorov, *Foucault, Freedom and Sovereignty*. p.33.

14 Rajchman 1985 122-3 cit Ibid.

15 "I have been seeking to stress that the thread that may connect us with the Enlightenment is not faithfulness to doctrinal elements, but rather the permanent reactivation of an attitude – that is, of a philosophical ethos that could be described as a permanent critique of our historical era.... This ethos implies, first, the refusal of what I like to call the 'blackmail' of the Enlightenment." Foucault, "What Is Enlightenment?." p.42.

the *necessity* of resistance to prevailing discursive frames and the potential emergence of alternative frames. This is a resistance to which the thesis has sought to remain sensitive throughout; a resistance which suggests the existence of an 'austere ontology'.<sup>16</sup> As Prozorov says, this is an ontology which identifies "a capacity to act, be acted upon and resist force."<sup>17</sup> Its austerity lies in the fact that it does not require – indeed, positively avoids – the description (or performative production of) a substantive subjectivity. This, then, is a purposefully *uncertain* ontology, which does not know whether this 'capacity' will lead to action or, indeed, of what any potential action might consist. It is an ontology which identifies an essential *vitality*; this is, in accordance with the above reference to Nietzsche's 'good Europeans', a vitality associated with an absence of substantive meaning or certainty.

An endorsement of this Foucauldian conception of freedom renders explicable the approach taken throughout the thesis; the effort to describe the governmental implications of particular cosmopolitan rationalities and expose their dangerous underbelly can be understood both as an intellectual act of freedom and as a facilitator of concrete practices of *freedom as resistance* in European politics. It is an assertion of the *vitality* and freedom of scholarship to act as critic of prevailing government, unburdened by the *governing imperative* of 'solutions' or 'disciplines' which constantly threatens to encroach the academy. It is a *practice* of freedom in the face of both a mainstream political science in European and 'governance' studies and a normative analytical

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16 Prozorov, *Foucault, Freedom and Sovereignty*.

17 Ibid. p.34.

political theory, which both – sometimes surreptitiously - rely upon a substantive ontology and epistemology that delimits the seeable and sayable.<sup>18</sup> In a more concrete sense, it is hoped that the critiques contained in the thesis will lend *political* weight to a potentially diverse – even contradictory – range of ethico-political activists who, in one way or another, are concerned about the totalising impact of aspects of European government, even as they are part of that government (see, in particular, Chapter 6).

While it has been critical of many governing practices/ ideas throughout, the thesis is certainly not anti-EU(rope). Indeed, for all the efforts to govern EU(rope), it remains a site of disagreement, disputation and plurality, both in terms of a practical politics and a disciplinary or scholarly politics that cannot ever quite agree on the appropriate disciplinary or analytical lens for comprehending its reality (among those that have tried, we could list: Inter-national Relations, Governance/ Globalisation Studies, Comparative Politics, Political Science). This thesis has, of course, highlighted, in particular, the importance of the imaginaries of nation-state/law and market/liberal political economy as dominating both the practical and scholarly politics of EU(rope). Whether one imaginary or the other is adopted, or whether an attempt is made to reconcile these imaginaries, the thesis has highlighted the ways in which, ultimately, a political totality or theoretical commensurability has not been achieved. This can be related to the discussion of liberal government in Chapter 1, which, in governing *through freedom* always leaves open a space

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18 It constitutes what David Owen has called an 'exemplary' critique. Such a critique, "cannot legislate autonomy for us, it recognizes no ground on which such an act of legislation could be secured, but it can (and does) exemplify its commitment to the value of autonomy in the form of its reflection on our present, that is, in terms of what it *shows* as well as in terms of what it *says*" David Owen, "Genealogy as Exemplary Critique: Reflections on Foucault and the Imagination of the Political," *Economy and Society* 24, no. 4 (1995). p.492.

for resistance or dissent. Indeed, it is such a space and not a perceived disregard for Westphalian conventions (Manners) or, conversely, the virtues of the European nation-state (Habermas) that renders EU(rope) of ethical value. It is to the extent that a liberal or cosmopolitan EU(rope) can be identified as a space of potential dissent or an (ontologically) plural arena, that this thesis would cohere with the notion that it can be understood as a 'normative power', albeit one that is constantly under threat from a persistent will to knowledge, identity or certitude.<sup>19</sup>

From this perspective, the achievement of the founding fathers of the European project was not simply to put an end to nationalist rivalries that had wrought such violences in modern Europe through a technocratic or functionalist market-based solution. The implementation of that very solution required an emotional or affective shift which had taken place in the context of the early federalist movements and civil society groups advocating post-war reconciliation; indeed, it was the formation of a solidarist identity across national(ist) borders that permitted the formation of independent European governing 'communities' whose sovereign competencies were the beginnings of a supranational reality in Europe.<sup>20</sup> The European 'subject of interest' was, from the outset, then, dependent upon the 'subject of right' – some notion of (social) contract or trust - even as these subjectivities were at once placed in a potentially antagonistic relationship that persists in EU(ropean) government to this day. The point is that the European project was founded on an ambiguous or uncertain mix of cosmopolitan governing

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19 Turner, "Jürgen Habermas: European or German?."

20 See, for instance, Guisan-Dickinson, "The European Union's Identity and the Politics of Reconciliation."

rationalities – a mix of solidarity and self-interest - and this inherent ambiguity may be what constituted its ethical value. Indeed, I would argue that it is the very contrary of an acceptance of this ambiguity - a yearning for meaning and an associated security in one's own identity – that constitutes Europe's greatest contemporary danger.

The *vitality* inherent in such ambiguity is based, then, upon a *happy reconciliation* with the irreconcilability of one's own identity, which is constitutive of an empathy for difference and a resistance to totalising identities. As Kristeva says, "I am convinced that, in the long run, only a thorough investigation of our remarkable relationship with both the *other* and *strangeness within ourselves* can lead people to give up hunting for the scapegoat outside their group."<sup>21</sup> Such an ethic is perhaps best pursued via an aesthetic or poetic engagement which draws attention to the gap between the represented and any particular representation.<sup>22</sup> Indeed, an aesthetic engagement is present in a range of cultural resources – literature, film, novels – in Europe, as well as within more obviously political activism and scholarship. Indeed, it is such an ethic that has inspired this thesis, in its engagement with such representations as "subjects of interest" and "subjects of right". Indeed, in response to governmental attempts to performatively enact particular ideal visions of citizen or entrepreneur - which engender tensions with a host of different others - it has sought to constantly affirm the *strangeness within ourselves*. It has proffered

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21 Julia Kristeva, *Nations without Nationalism* (New York: Columbia Univ. Press, 1993). P.51.

22 Roland Bleiker, "The Aesthetic Turn in International Political Theory," *Millennium - Journal of International Studies* 30, no. 3 (2001).

what Butler calls "an ethics based on our shared, invariable and partial blindness about ourselves."<sup>23</sup> This is to concur with Gordon who notes that,

...in order for [Foucault's] question of 'what are we' actually to be a question at all, it may be vital to retain a margin of uncertainty or under-determination regarding the ethical status of anthropological categories, or whatever terms occupy their place: a possibility of knowing that we do not know what we are.<sup>24</sup>

### **Towards an Ironic Cosmopolitan Politics in/for EU(rope)**

This uncertainty or undecidability is not to shirk the exigencies of political decision or judgement. Indeed, a judgement about which discourses are prevalent and therefore most important in attempting to represent 'what we are' is made, mostly implicitly, within this thesis. As stated in Introduction and alluded to throughout, this thesis has suggested that market cosmopolitan rationalities have become too prominent in EU(rope) and it would concur with Habermas (Chapter 3) that a neo-liberal government may detrimentally impact the possibility of individual and collective political autonomy. Contra Habermas, this is conceived as a contingent judgement based on the current historical context in which the market is – *à la* ordo-liberalism – frequently portrayed as that to which government and subjects must respond. Indeed, in much contemporary governmental and popular discourse – particularly in the context of the current sovereign debt crisis - the market *is* government. Thus, even as I, following Foucault, sympathise with the contingent *ethical* adversaries of certain market cosmopolitan Europeans –

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23 Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005). p.41.

24 Gordon, "Question, Ethos, Event: Foucault on Kant and Enlightenment." p.85.

particularly the ordo-liberal opposition to Nazism, nationalism and monopoly – I share Habermas's alarm at the embrace of a neo-liberal ethic in Europe. More specifically, I am concerned by the extent to which a competitiveness agenda and the neo-liberal subject of entrepreneur is becoming a totality in the context of European-level government. The current political-economic difficulties in EU(rope) seem to have done very little to prompt a shift in this orientation, as reflected in the recently launched replacement for the Lisbon strategy, 'Europe 2020', which, by and large, offers more of the same (see Chapter 6).

Such ethico-political judgement is important in the ongoing effort to *render possible* an aesthetic or poetic engagement. Consider as an example of pertinence to this thesis, France's championing of cultural protectionism in international fora such as the WTO and UNESCO, often in the face of a perceived Hollywoodisation.<sup>25</sup> In the context of the aforementioned political judgement such policies are understood primarily as *preserving a space* for a vital cultural expression or an aesthetic ethical resistance of the sort discussed in the face of a potential marketisation. The danger of most pressing contingent concern is that the market validates itself through various cultural outlets and the possibility of highlighting its potentially violent tendencies is foreclosed.

This is not to forget - as discussed in Chapter 4 - that such a space might be easily occupied by a chauvinistic identity politics that reinforces the imaginary of nation-state (or EU(rope) as nation-state) or that these dangers are present in contemporary French

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25 Sophie Meunier, "The French Exception," *Foreign Affairs* 79, no. 4 (2000).

politics. However, in judging that it is a market cosmopolitan rationality that must be contingently resisted, such policies of cultural protectionism might be supported to the extent that they both constitute - and facilitate the dissemination of - a critique of the marketisation of cultural life itself. Indeed, resistance to the imperatives of the global or European market and the entrepreneurial subjectivities enjoined to operate within this space might be particularly timely in the context of contemporary European politics, even as a vigilance must be maintained towards the potentials of an exclusionary citizenship. This thesis is clear, then, on the importance of ethico-political decision in the face of the undecidable; indeed, such a decision is present in the genealogical method deployed in much of the thesis (see Introduction).

Jacques Derrida's decision in 2003 to co-sign Habermas's European 'manifesto' (discussed and critiqued in Chapter 4) can be understood in similar terms. We might have expected Derrida – a philosopher whose deconstructive method is preoccupied with the difficulties of identity – to align himself with the critics of the manifesto and express a concern with the way in which its polemical celebration of inside and chastisement of outside risks excluding a host of Europe's "others." However, in acting politically, at that moment, Derrida affirmed a closure not consistent with his ethical openness. As Derrida has said,

...the difficulty is to gesture in opposite directions at the same time; on the one hand to preserve a distance and suspicion with regard to the official political codes governing reality; on the other, to intervene here and now in a practical and engaged manner whenever the necessity arises. This position of dual allegiance, in which I personally find myself, is one of



*perpetual uneasiness*. I try where I can to act politically while recognising that such action remains incommensurate with my intellectual project of deconstruction.<sup>26</sup>

Derrida *has* repeatedly made such political interventions in practice and in 2003 he joined his onetime critic in making just such an intervention with reference to European foreign policy and the Iraq war. Habermas has sought to paper-over the extant impasses (or 'performative contradictions') associated with *his own* political interventions (see the discussion of his 'co-originality thesis' in Chapter 4), just as European government frequently attempts to *resolve* the obvious tension in its extant 'unity in diversity'. In contrast, Derrida is happy to live with 'performative contradiction' or incommensurability: the "perpetual uneasiness," the "undecidability," or uncertainty that he associates with any contingent polemical intervention. Uncertainty or ambiguity in this context might be regarded as an ethical resource. It is not, then, the uncertainty deployed as a specific means of rendering forward regarding, independent and autonomous subjects – Bentham's famous 'yoke of foresight' – associated with a specific form of liberal government and disciplinary practices (see Chapters 1 and 6). It is, rather, what might be termed a *radical* uncertainty or insecurity which, on the one hand does not require any *particular* response – and associated subjectivity, identity – nor, on the other hand, does it foreclose any particular response. This is to leave open rather than seek to close down a potentially valuable paradox. It is a paradox encapsulated in the idea that Derrida is apparently secure in his ontological insecurity, easy in his perpetual uneasiness, able to decide in the face of undecidability. Perhaps one reason for his

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26 Jacques Derrida, "Dialogue with Jacques Derrida," in *Dialogues with Contemporary Continental Thinkers*, ed. Richard Kearney (Manchester: Manchester University Press, 1984).  
120.

apparent *sense of security* is the dangerous and inhuman(e) alternative to an uneasy or paradoxical political intervention. As he notes:

If the whole political project would be the reassuring object or the logical or theoretical consequence of assured knowledge (euphoric, without paradox, without aporia, free of contradiction, without undecidabilities to decide), that would be a machine that runs without us, without responsibility, without decision, at bottom without ethics, nor law, nor politics.<sup>27</sup>

Taking heed of Derrida's words and Foucault's austere ontology, I favour an ambiguous or *ironic* cosmopolitan approach to ethics/politics, which involves a realisation on the one hand that any way of *doing* ethics/politics will provoke some ethical question mark and, on the other hand, that we cannot and *should not* abdicate from an engagement with the political, precisely because of the continuous impulse to action that our realisation of these very question marks triggers. Concretely, we might, like Derrida, contingently support Habermas's political assault on neo-liberal Europe and his polemical promotion of a set of immanent alternatives, precisely because neoliberal practices risk undermining the very possibility of politics as contest and a deliberative governmentality is no adversary in the face of such a non-politics. At the same time we realise that an alternative post-national politics or Derrida's "democracy to come" does not find its realisation in the emergence of a discourse ethic within Europe's borders; indeed, it is *never* realised. This very ability to "gesture in opposite directions" is itself ethically significant; even as we enact ethical closures in the world, this ironic sensibility makes it more difficult for such closures to remain unchallenged. To paraphrase pragmatist

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27 ———, "Intellectual Courage: An Interview by Thomas Assheuer," *Culture Machine* (2002), <http://www.culturemachine.net/index.php/cm/article/view/303/288>.

philosopher Richard Rorty, while "today's chains are often forged from hammers which struck off yesterday's. . .[these] chains might, with luck, get a little lighter and more breakable each time."<sup>28</sup>

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<sup>28</sup> Richard Rorty, "Habermas, Derrida and the Functions of Philosophy," in *The Derrida-Habermas Reader*, ed. Lasse Thomassen (Edinburgh University Press, 2006). p.57.

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